TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 612

GREAT NORTHERN RAILWAY COMPANY,
APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MINNESOTA

FILED NOVEMBER 11, 1927

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INDEX

	Original	Print
Record from the district court of the United States, district of Minnesota	1	1
Caption.....(omitted in printing)..	1	
Petition	2	1
Exhibit "A"—Certificate of I. C. C.	35	22
"B"—Certificate of I. C. C.	37	23
"C"—Amended certificate of I. C. C.	40	24
"D"—Agreement between Great Northern Ry. Co. and United States	43	26
Intervention of I. C. C.	49	30
Answer of I. C. C.	50	30
Exhibit "A"—Agreement between Director General of Railroads and Great Northern Ry. Co. et al...	60	39

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 4, 1928

	Original	Print
Answer of United States	87	75
Exhibit 1—Report of I. C. C., Finance Docket No. 501	94	81
Order dismissing petition	118	107
Amended order dismissing petition	121	110
Petition for appeal and order allowing same	124	112
Bond on appeal (omitted in printing)	126	
Assignments of error	129	113
Citation and service (omitted in printing)	131	
Præcipe for transcript of record	133	115
Clerk's certificate (omitted in printing)	135	
Statement of points to be relied upon and designation to print entire record	136	116

[fols. a & 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, THIRD DIVISION

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Petitioner,

vs.

UNITED STATES OF AMERICA, Defendant

PETITION—Filed November 12, 1926

To the Honorable Judges of the District Court of the United States for the District of Minnesota:

Great Northern Railway Company, a citizen and resident of the City of St. Paul, County of Ramsey, State of Minnesota, brings this petition against the United States of America to enjoin, set aside, annul and suspend two orders hereinafter set forth of the Interstate Commerce Commission of the United States (hereinafter called the "Commission"), dated June 17, 1925, and June 8, 1926, respectively, and purporting to fix the compensation due to petitioner under the guaranty of its earnings for the period [fol. 3] from March 1, 1920, to September 1, 1920, (hereinafter referred to as the "guaranty period"), under the terms of Sections 209 and 212 of the Transportation Act of 1920, and to restrain the defendant from acting thereunder, and thereupon petitioner alleges:

I

Petitioner is and at all times herein mentioned has been a corporation organized and existing under and by virtue of the laws of the State of Minnesota and a carrier by railroad subject to the Interstate Commerce Act and owning and, except during the period of Federal control hereinafter referred to, operating a railroad and system of transportation thereover in the States of Minnesota, Wisconsin, Iowa, North Dakota, South Dakota, Montana, Idaho,

Washington and Oregon, and also owning the stock of certain subsidiary railway corporations owning railways in the United States and of certain other subsidiary railway corporations owning railways in Canada.

II

The orders complained of herein were not made upon the petition of any party and do not relate to any matters complained of in any petition before the Commission, and do not relate to transportation. The petitioner in this action has its principal operating office in St. Paul, in the said District of Minnesota, Third Division.

[fol. 4]

III

On December 31, 1917, the President of the United States took possession of said Railroad owned by petitioner and of its subsidiary companies owning railways in the United States, under the provisions of the United States Federal Possession and Control Act of August 29, 1916, (39 Stats. at L. 645), and continued to operate said railroads under said Act, and under the Federal Control Act of March 21, 1918, (40 Stats. at L. 451) until March 1, 1920, at 12:01 a. m., which period is hereinafter referred to as "Federal Control".

IV

On December 30, 1918, W. G. McAdoo, Director General of Railroads for the United States, entered into a contract with the petitioner and its said subsidiary companies owning railways in the United States fixing the annual compensation to be paid to said companies under Section 1 of the Federal Control Act of the United States.

V

Prior to March 15, 1920, petitioner and said subsidiary companies owning railways in the United States filed with the Commission a written statement that it and they accepted all the provisions of Section 209 of the Transportation Act of 1920.

VI

During the guaranty period petitioner made application to the Commission for advances of certain sums in the [fol. 5] amounts hereinafter named, which were necessary to enable it to meet its fixed charges and operating expenses, and the Commission accordingly, on the following-named dates, certified to the Secretary of the Treasury the following amounts in which and the following times at which such advances might be made:

Number of certificate	Date of certificate and for payment	Amount
A-65	June 25, 1920	$3,000,000
A-225	Aug. 31, 1920	$2,000,000
A-276	Nov. 4, 1920	$1,500,000

Said amounts were not in excess of the estimated amount necessary to make good to petitioner the guaranty provided for in Section 209 of the Transportation Act.

VII

On June 30, 1920, before receiving any of the payments mentioned in paragraph VI hereof, petitioner executed a contract with the Secretary of the Treasury of the United States, to the effect that upon final determination of the amount of the guaranty provided for by said Section 209 of the Transportation Act of 1920 it would repay to the United States any amounts received by it from such advances under Section 209 (h) in excess of said guaranty, with interest at six per cent per annum from the time such excess was paid. The said Secretary of the Treasury directed petitioner to secure its performance of said contract [fol. 6] by executing and delivering to him its promissory notes in the respective amounts of said payments and by pledging with him to secure the payment of said notes and the performance of said contract, Liberty bonds in the amounts hereinafter designated, and petitioner thereupon deposited and pledged with said Secretary of the Treasury Liberty bonds owned by it of the issues and amounts below stated to secure its performance of said contract.

Date of deposit	Face value of bonds	Issue
July 2, 1920	$900,600	Fourth 4¼%
Sept. 13, 1920	$500,000	Fourth 4¼%
Nov. 18, 1920	$225,000	Second Liberty Loan Convertible 4¼%

Said contract with the Secretary of the Treasury provided that in the event of default of repayment by petitioner of any sum due thereunder, the Secretary of the Treasury, or his agents, should have the right to sell and dispose of the said Liberty bonds, either at a private or public sale, with or without notice. Said contract further provided that if, upon the final determination by the Commission of the amount of guaranty due to the petitioner, it should be found that the advances received by petitioner under Section 209 were less than or did not exceed the amount of the guaranty, the Secretary of the Treasury would release said Liberty bonds.

[fol. 7] VIII

The Commission on the 18th day of October, 1920, in a proceeding entitled "In the Matter of Settlements with Carriers under the Provisions of Section 209 of the Transportation Act of 1920", ordered all carriers which had accepted the provisions of said Section 209 to file with the Commission true and correct returns to a questionnaire and form of claim accompanying said order, which returns were to be the basis for settlements under said Section 209. Pursuant to the requirements of said order, and in the form of claim therein provided for, petitioner filed, on the 11th day of February, 1921, its duly verified return showing that $14,333,340.54 was one-half of its standard return as above defined, and therefore one-half of the annual compensation fixed by its said contract under the Federal Control Act, and that the amount of increase in such compensation provided for in Section 4 of said Act was $509,217.46. Said return further showed that petitioner had an operating deficit during the guaranty period amounting to $3,655,833.67. The total amount claimed to be due petitioner in said return, without deduction for advances theretofore

made, was the sum of $18,498,391.67, making the amount remaining due to petitioner in final settlement, after deduction of advances theretofore made, the sum of $11,998,-391.67.

[fol. 8] Thereafter and on March 1, 1921, and in accordance with Section 212 of the Transportation Act (as added by the Act of February 26, 1921, 41 Stats. at L. 1145), the Commission, not then being able finally to determine the whole amount due to petitioner under said Section 209, nevertheless definitely ascertained that the sum of $6,000,000 was due to petitioner under said Section 209 in addition to the payments above mentioned and in addition to any further sums that might later be determined upon, and thereupon said Commission issued its certain certificate to that effect, a copy of which is hereunto attached and marked "Exhibit A." Petitioner thereupon presented said certificate to the Secretary of the Treasury and received its payment of $6,000,000 in accordance therewith.

X

On the 15th day of December, 1921, in a proceeding entitled "In the Matter of Final Settlement under Section 209 of the Transportation Act," said proceeding being Finance Docket No. 1606, the Commission fixed December 31, 1921, as the date on which all accounts pertaining to the guaranty period should be considered closed for the purpose of computing the guaranty, and all carriers entitled to a guaranty were directed to file, on or before March 1, 1922, (which time was later extended by the Commission in the case of petitioner until and including June 15, 1922), [fol. 9] final statements of amounts due them on forms prescribed in said order. Thereafter and on the 15th day of June, 1922, petitioner filed a statement of claim as required by said order, claiming as the total amount of its guaranty the sum of $17,599,756.42, and as the balance remaining due, after deducting the advances already received, the sum of $5,099,756.42. Petitioner protested against the form of the return and the formulas prescribed by the Commission in said order, to the extent that they embodied the errors hereinafter referred to. Thereafter petitioner's said claim for balance due to it was revised in conference with the

Commission's representatives, and reduced to the sum of $17,421,650.35, leaving a balance claimed by petitioner of $4,921,650.35, which claim was pending before the Commission at the time of its subsequent orders hereinafter referred to. Petitioner in said conference before the Bureau of Finance of the Commission and in the hearings before Division 4 and before the entire Commission hereinafter referred to, protested that the Commission's certificate of March 1, 1921, definitely ascertaining that the sum of $6,000,000 was due to petitioner, was a final determination of the minimum amount due to petitioner to the extent of the sum so ascertained, and that the Commission was without jurisdiction to consider any reduction in said sum or to consider any question at all in said proceedings other than the question as to what additional sum, if any, should be certified as due to petitioner over and above the sum of $12,500,000 theretofore paid.

[fol. 10] On June 17, 1925, said Commission, acting without any authority therefor, but purporting to act under authority of paragraph (g) of Section 209 of the Transportation Act, wrongfully and unlawfully determined that the total amount due to petitioner under said Section 209 (including amounts of $75,698.89 and $31,418.88 due, respectively, to the Watertown & Sioux Falls Railway Company, a corporation of the State of South Dakota, and to the Farmers Grain & Shipping Company, a corporation of the State of North Dakota, for which companies the Commission then claimed that petitioner was the duly authorized agent for the purpose of making settlements under Section 209), was the sum of $11,178,887.31, and that there was due to the United States from petitioner under Section 209 (g), a refund, in the sum of $1,321,112.69, of payments theretofore made, and the Commission thereupon wrongfully and unlawfully issued its certificate, a copy of which is hereunto attached and marked "Exhibit B," reciting that complainant was indebted to the United States in the sum of $1,321,112.69. Said Commission thereupon delivered said certificate to the Secretary of the Treasury of the United States and he thereupon demanded of petitioner that it refund and pay to the United States the said sum of $1,321,112.69, and thereby the Commission wrongfully and without any jurisdiction or authority, sought to

modify its definite ascertainment under Section 212 and to [fol. 11] reduce the amount which it had definitely ascertained thereunder was due to petitioner, and to require a large part thereof to be paid back by petitioner. The Commission's said findings and order are reported in Vol. 99 I. C. C. Reporter, page 231. The said order of the Commission was made by Division 4 thereof. Thereafter petitioner's said claim was reargued before the entire Commission. On the 8th day of June, 1926, the Commission entered its order amending the said certificate of June 17, 1925, and issuing an amended certificate, whereby it wrongfully and unlawfully determined that the total amount due to petitioner under said Section 209 of the Transportation Act, is the sum of $11,170,214.02. Said last named certificate was likewise delivered to the said Secretary of the Treasury, a copy of which said certificate is hereto attached and marked "Exhibit C."

XII

The Commission's said orders and certificates of June 17, 1925, and of June 8, 1926, were made without jurisdiction in the matter, for the reasons stated in the preceding paragraphs, particularly paragraphs VIII to XI, inclusive, the former certificate of March 1, 1921, being a final adjudication that at least the amount named therein was due to petitioner and the Commission being without authority to find or determine that a lesser amount was due. Said orders and certificates were unlawful for the additional reason that, at all times herein mentioned, the Commission has intentionally failed, omitted and refused to consider, [fol. 12] estimate, determine or certify to certain items and amounts which the law required it to consider, estimate, determine or certify, and which petitioner duly claimed, and requested the Commission to determine, and which petitioner was entitled to under the terms of said Section 209 and which would have necessitated a finding and certificate of indebtedness of the United States to petitioner under said Section 209 greatly in excess of the amounts previously paid to petitioner as aforesaid. Petitioner had not on June 17, 1925, nor on June 8, 1926, and has not now in fact been overpaid in any amount whatever under the terms of said

Section 209, or otherwise, and the payments heretofore made to it are not in fact in excess of the amounts necessary to discharge the obligations of the United States to petitioner under Section 209, but on the contrary the Commission's certificate of March 1, 1921, as well as its certificates of June 17, 1925, and June 8, 1926, each greatly understated the amounts due to petitioner. The items and amounts which the Commission failed and refused to consider, estimate, determine or certify as aforesaid are more specifically stated and described in the following paragraphs.

XIII

The petitioner and its subsidiary corporations owning railways in Canada (herein called "Canadian subsidiaries") and five of its subsidiary corporations owning railways in the United States (herein called "American [fol. 13] subsidiaries") are herein sometimes referred to as "consolidated companies," the reasons for grouping said companies together in such statements being as follows: At the time of making the said contract of December 30, 1918, with the Director General, the petitioner owned the stock of eight Canadian subsidiaries and of nine companies owning railways in the United States, the last named nine companies all being parties to the said contract of December 30, 1918, with the Director General. Four of said last named companies kept separate accounts and made separate reports to the Commission and are, therefore, excluded from the following statements. The remaining five of said companies (being those above designated as "American subsidiaries") and the said Canadian subsidiaries (forming the group which with petitioner is above designated as the "consolidated companies") were at all times herein mentioned operated as a part of petitioner's system of transportation and in conjunction with petitioner's line of railway and under a unified system of operation, their railways all being interconnected. Their revenues and expenses were included in petitioner's accounts with its own revenues and expenses, and without segregation, for the three years ended June 30, 1917, (hereinafter called the "test period"), as well as for the guaranty period, and were fully reflected in petitioner's aver-

age net railway operating income (herein called "standard return") for the test period. The properties of petitioner and of all of said American subsidiaries were under Fed-
[fol. 14] eral control during the full period thereof. The said contract of December 30, 1918, with the Director General provided that the petitioner would cause the lines of said Canadian subsidiaries to be operated during Federal control, in conjunction with the balance of petitioner's system of transportation, as had theretofore been done; that petitioner would vote its stock in said companies as directed by the Director General; that petitioner would cause the Boards of Directors of said companies to elect such officers or agents as the Director General should direct; that whenever practicable, the officers, agents and employes of the Director General engaged in operating the petitioner's system of transportation should perform like services for the said Canadian subsidiaries; and that the annual compensation to be paid to petitioner should be its standard return, as above defined, and as finally determined by the Commission, and that in addition thereto, the Director General would pay to petitioner or for its account, the same amount of operating expenses, taxes and other similar charges (including interest upon amounts expended for additions, betterments and road extensions) that he would have to pay if said Canadian subsidaries were located in the United States and were parties to said contract of December 30, 1918, and were under Federal control, and that petitioner would pay to the Director General of Railroads an amount equivalent to the railway operating revenues of said Canadian subsidiaries during Federal control.
[fol. 15] The Commission in making all of its certificates and payments hereinabove referred to, determined that, for the purpose of fixing the amount of the guaranty of the petitioner and its said American subsidiaries under Section 209 of the Transportation Act of 1920, their net railway operating income, together with that of the Canadian subsidiaries, should remain consolidated for both the test period and the guaranty period; and that for the purpose of determining the increases in such compensation provided for in Section 4 of the Federal Control Act their investment accounts should remain consolidated for both of said periods; and that for the purpose of fixing the

amounts to be included in operating expenses for maintenance of way and structures and for maintenance of equipment under said paragraph (3) of Section 209 their operating expense accounts should remain consolidated for both of said periods. The combined net railway operating income of said consolidated companies is hereinafter referred to as the "consolidated income." The annual compensation named in the said contract of December 30, 1918, with the Director General included the compensation due to petitioner, as well as to the nine subsidiary companies which were parties to said contract. In determining the "just compensation" for petitioner and the remaining five American subsidiaries, provided for in paragraph (c)-(1) of said Section 209, the Commission determined that the annual compensation of said companies named in said contract of December 30, 1918, was one-half of the average [fol. 16] annual consolidated income for the test period, and it has determined that petitioner is entitled to the payment of said compensation for all of said companies, and has been governed by said determination in making all of its certificates hereinabove referred to. All of said consolidated companies have agreed to the determinations referred to in this paragraph without protest, except as hereinafter otherwise stated. Each of said consolidated companies has heretofore assigned to petitioner all right, title and interest in or to any and all compensation to which it is or was entitled under said Section 209.

XIV

In making its certificates above mentioned for payments due to petitioner under Section 209 of the Transportation Act, the Commission duly allowed to petitioner one-half of the said consolidated income, but failed and refused and has at all times herein mentioned failed and refused to fully determine and certify the increases in such compensation to petitioner, or to any of said consolidated companies, as provided for in Section 4 of the Federal Control Act, as it was required to do by paragraph (c)-(1) of Section 209 of the Transportation Act. On March 4, 1920, the President, acting through the Director General of Railroads, had fixed a reasonable rate per centum upon the

cost of any additions and betterments, less retirements, and upon the cost of road extensions to the property of petitioner, as required by Section 4 of said Federal Control [fol. 17] Act, at the rate of four per cent per annum (except that the rate of six per cent was fixed by him in the case of new equipment and betterments to equipment) upon the cost of additions and betterments, or road extensions made by petitioner or its said subsidiaries with the approval of or by order of the President during the period of Federal control. Prior to the period of Federal control, the petitioner and said consolidated companies had expended certain sums on account of new equipment and betterments to equipment and for other additions and betterments and extensions to their roads, which said additions, betterments or extensions had not been completed or put into operation and had not formed a part of the operated property of any of said consolidated companies until after the commencement of Federal control, and all of which were completed and put into operation during Federal control, with the approval of or by order of the President, acting through the Director General of Railroads, and petitioner duly claimed the additional compensation therefor, as provided by law. Notwithstanding the foregoing facts, the Commission, with full knowledge of said facts, deliberately and intentionally failed and refused, in making its said certificates of June 17, 1925, and June 8, 1926, to determine the amount of such additional compensation, or to credit petitioner, or any of its subsidiaries, with or to allow them any interest or compensation whatever upon any sums expended prior to Federal control, or to determine the amount [fol. 18] thereof. On the contrary, the Commission found, and it expressly declared in its said decision of June 8, 1926, as follows:

"Under the contract between the carrier and the Director General the carrier waived interest on cost of additions and betterments made by the corporation and uncompleted December 31, 1917."

There was in fact no such waiver in said contract between petitioner and the Director General, and the Commission in taking its action referred to in this paragraph was governed by an erroneous conclusion of law as to the legal

effect of said contract. Petitioner is entitled to a payment from the United States, under said Section 209, in addition to all payments found by the Commission to be due to it, in the sum of $157,187.52, on account of the facts alleged in this paragraph.

XV

Paragraph (f)-(3) of said Section 209 requires the Commission to make to petitioner and to said American subsidiaries, an allowance for expenses of maintenance of their property, to-wit, for maintenance of way and structures embraced in that property and for maintenance of equipment embraced in that property during the guaranty period which shall, so far as practicable, apply the rule set forth in the proviso to paragraph (a) of Section 5 of the standard contract between the United States and the carriers, and said Commission, in its said order of October 18, 1920, required petitioner to set up its maintenance expenses [fol. 19] for the guaranty period in accordance therewith. Said paragraph (a) of said Section 5 is identical with the corresponding paragraph in said contract of December 30, 1918, with petitioner and reads as follows:

"Sec. 5. (a) During the period of Federal control the Director General shall, annually, as nearly as practicable, expend and charge to railway operating expenses, either in payments for labor and material or by payments into funds, such sums for the maintenance, repair, renewal, retirement, and depreciation of the property described in paragraph (a) of section 2 hereof as may be requisite in order that such property may be returned to the Companies at the end of Federal control in substantially as good repair and in substantially as complete equipment as it was on January 1, 1918; Provided, however, that the annual expenditure and charges for such purposes during the period of Federal control on such property and the fair distribution thereof over the same, or the payment into funds of an amount equal in the aggregate (subject to the adjustments provided in paragraph (c) and to the provisions of paragraph (e) of this section) to the average annual expenditure and charges for such purposes included under the accounting rules of the Commission in railway operating expenses

during the test period, less the cost of fire insurance included therein, shall be taken as a full compliance with the foregoing covenant."

[fol. 20] Paragraph (c) referred to in the above proviso reads as follows in both of said contracts:

"(c) In comparing the amounts expended and charged under the provisions of paragraphs (a) and (b) of this section with the amounts expended and charged during the test period, due allowance shall be made for any difference that may exist between the cost of labor and materials and between the amount of property taken over and the average for the test period, and, as to paragraph (a), for any difference in use between that of the test period and during Federal control which in the opinion of the Commission is substantial enough to be considered, so that the result shall be, as nearly as practicable, the same relative amount, character, and durability of physical reparation."

The property described in paragraph (a) of Section 2 of said contract of December 30, 1918, included the said railways of petitioner and its American subsidiaries.

The Commission determined, and used in making said certificates of March 1, 1921, June 17, 1925, and June 8, 1926, certain ratios to be applied to the test period expenditures of the consolidated companies, in order to make allowance for differences which it found to exist between the cost of labor and material in the test period and the guaranty period, and between the amount of property maintained in the guaranty period and the average for the test period, and for differences in use of such property, which it found to exist in substantial amounts, between the test [fol. 21] period and the guaranty period. But the Commission in determining the amount of said allowance to petitioner and in making said certificates, applied said ratios to the expenditures of the consolidated companies for maintenance during one-sixth of the entire test period, and not during the same months of the years of the test period (hereinafter called the "guaranty months") as were embraced in the guaranty period. The expenditures which must be made for maintenance vary greatly on every railroad as between the guaranty months and the remaining

months of the year. In the case of the consolidated companies, one-sixth of the test period expenditure for maintenance amounted to the sum of $9,385,841.51, whereas the average expenditure for maintenance during the guaranty months of each of the three years of the test period was $10,876,494.01. Climatic and operating conditions necessitated a corresponding and similar variation between the guaranty months and the remaining months of the year, in every year of the test period as well as in each year of Federal control and in the year of the guaranty period, on the properties of the consolidated companies, and a similar variation, differing only in degree, on all railroads. In order to make an allowance for maintenance expenditures in the guaranty period, which should provide as nearly as practicable the same relative amount, character and durability of physical reparation in the year of the guaranty period as in the average of the years of the test period, and in the months of the guaranty period as in the guaranty [fol. 22] months of the test period, by means of the adjustments provided for in paragraph (c) of Section 5 of said standard contract, it was necessary to take as a base on every railway, and particularly on the railways of the said consolidated companies, the average maintenance expenditures of the guaranty months of each year of the test period, and petitioner used such base in filing its said claim with the Commission on February 11, 1921, as aforesaid. Taking one-sixth of the entire test period maintenance expense as a base and applying the said adjustment ratios determined by the Commission, produces a maintenance allowance for the guaranty period in excess of needs in the case of some railways and far below the needs in the case of other railways, and produces an unreasonable distortion of the allowances intended by the statute. One-sixth of the maintenance expenditures of the entire test period bears no reasonable or logical relation to the requirements of railways in general or of the consolidated companies in particular for maintenance expenses during the guaranty period, and to apply the ratios determined by the Commission to such a base is wholly contrary to the spirit and intent of said Section 209 and of Section 5 of said standard contract. There was no substantial difference in the cost of labor and material or in the amount of property maintained, or

in the use of said property, as between one-sixth of the entire test period and the average of the periods included in the guaranty months of each year of the test period, and [fol. 23] the ratios determined by the Commission for differences in said matters as between the test period and the guaranty period would be substantially the same whether the comparison of the guaranty period be made with one-sixth of the test period or with the average period included in the guaranty months of each year of the test period. Applying the ratios determined by the Commission for such differences to the average maintenance expenses of the consolidated companies during the period of the guaranty months of each year of the test period, instead of during one-sixth of the entire test period, would produce an allowance to petitioner for maintenance expenses in the guaranty period $3,938,000.58 in excess of the allowance determined upon by the Commission in the manner above described. The Commission has at all times herein mentioned had full knowledge of all the facts alleged in this paragraph and the petitioner's claim based thereon, and has at all of said times deliberately and intentionally refused and failed and still refuses and fails to apply its ratios determined as aforesaid to the maintenance expenses of the petitioner or of the consolidated companies during the period of the guaranty months of the average of the years of the test period, and has intentionally and knowingly failed and refused and still fails and refuses to determine any ratios to apply to said last mentioned maintenance expenditures, or to determine what said last mentioned maintenance expenses amounted to, in order to make the adjustments provided for in said paragraph (c) [fol. 24] of Section 5 of said standard contract. In its said decision of June 8, 1926, the Commission found, and specifically declared with reference to the claim of the petitioner set forth in this paragraph, as follows:

"In any event, such a claim could not be considered, because the law definitely fixes as a base the average six months of the three year test period."

The law does not in fact fix as a base the average six months of the three year test period, and the Commission in making its determination referred to in this paragraph

was governed by the said erroneous conclusion of law as to the duties and authority imposed upon it, and acted under the mistaken assumption, not only that it was not obligated by law to fix as a base the average of the corresponding months of the test period, but that it had no discretion to adopt such a base. By the said erroneous conclusion of law petitioner has been deprived of any consideration by the Commission as to whether its discretion should not be exercised in favor of adopting as a base the comparable six months of the test period.

XVI

In determining its said ratio for differences existing between the cost of labor and material as between the test period and the guaranty period as provided for in said paragraph (3) of Section 5 of said standard contract, it was the duty of the Commission to fix, with due allowance for differences in the cost of labor and materials, an amount [fol. 25] representing the guaranty period equivalent of the expenditure for maintenance on the property of the consolidated companies during a corresponding part of the test period. The Commission undertook to perform this duty by fixing an equation factor to express the radio or resultant of the increases in cost experienced, or which should reasonably have been experienced, by petitioner during the guaranty period in respect of the same quantity of maintenance which according to its accounts it had put upon the property of the consolidated companies during a corresponding part of the test period. In order to fix this equation factor, the Commission should have based its action upon an analysis of the petitioner's own test period maintenance expenditures as shown by its accounts. But instead the Commission, acting upon an erroneous view of the law, based its action largely upon an analysis of the expenditures for maintenance during the test period upon various other railroads as shown by the accounts of such other railroads. By this erroneous process the Commission imported into its fixing of the amount of maintenance to be allowed petitioner for the guaranty period the test period conditions as to costs of labor and material and as to the proportions of different sorts of labor and material as such cost and proportions existed on various

other railroads, this being entirely beyond the intent of the standard contract as to any particular railroad and therefore entirely beyond the intent of Section 209 (f) (3). By reason of this error of law the Commission adopted an [fol. 26] equation factor or ratio of 2.45 to 1, which reflected principally maintenance conditions in the test period on other railroads, whereas if it had excluded the maintenance conditions of other railroads and had based its action upon the test period conditions of maintenance upon the property of the consolidated companies alone, the ratio or equation factor should have been not less than 2.57 to 1. The costs incurred by petitioner and by the consolidated companies and the ratio between such costs in the two periods, differed substantially from those incurred by such other companies in the following respects:

The costs of labor incurred by petitioner and by the consolidated companies were substantially lower than those incurred by such other companies in the test period and were on the same level with those of such other companies during the guaranty period (which was substantially higher than during the test period) so that the ratio of increase of such costs incurred by petitioner and by the consolidated companies from the test period to the guaranty period was much greater than in the case of such other companies. The material costs necessarily incurred by petitioner and by the consolidated companies varied materially in bo'h periods from those of such other companies, due to differences in distance from source of supply and due to different sources of supply with varying prices which are available to the different companies. Because of the foregoing facts, the ratio of increase in the cost of material necessarily incurred by petitioner and by the consolidated [fol. 27] companies from the test period to the guaranty period was substantially greater than in the case of such other companies. The said ratio or equation figure is a composite figure, being a weighted average of varying ratios applying to different items of labor and material costs. On all railroads there existed a larger ratio of increase for labor than for material as a whole and a larger ratio for maintenance of way expense and for maintenance of equipment expense as a whole. The Commission rated said varying rations applicable to individual items of cost

largely in the proportion in which the items of cost to which they applied were incurred on such other railroads in the same territory, whereas on the property of the petitioner and the consolidated companies the proportion of those items of cost which were subject to the higher ratios of increase, such as labor and maintenance of way costs, was much greater than it was on such other lines of railroad. The Commission failed to give adequate weight to the distribution of expenses and to the proportion of high ratio costs necessarily incurred on the property of the petitioner and of the consolidated companies. Petitioner based its claim filed February 11, 1921, as aforesaid, upon the increase of cost of labor and materials necessarily incurred by it and by the consolidated companies as aforesaid. The Commission knowingly, intentionally and arbitrarily refused to determine said last mentioned ratio or any ratio which would state or attempt to state exclusively the increase in such costs necessarily incurred by the peti- [fol. 28] tioner or by the consolidated companies, and reduced said radio, solely because of the fact that a smaller ratio of such increase existed in the case of such other companies. The use of the said ratio of 2.57 would produce an additional allowance to petitioner under Section 209 of the Transportation Act in excess of any allowance determined upon by the Commission or included in any of said certificates, of $1,016,700.92, if applied to one-sixth of the test period expenditures, and $1,186,520.93 if applied to the average expenditures of the guaranty months of the test period.

XVII

In computing said ratio for increase in cost of labor, the Commission considered only the increase in price paid per unit of time of employment of labor, and failed and refused to consider or determine the increase in cost of labor per unit of work accomplished. Labor on all railroads was less effective in the guaranty period than in the test period and accomplished less work in proportion to time employed in the guaranty period than in the test period, due principally to changes in rules and working conditions, brought about during Federal control. The average hours of work per man per day had been greatly reduced by the Director Gen-

eral during Federal control, and remained much less in the guaranty period than in the test period. Such time per man, used in going to and coming from work and in neces-
[fol. 29] sary interruptions to work, as was paid for by all railways in both periods, remained approximately the same amount per man per day in the guaranty period as in the test period and consequently constituted a substantially higher percentage of the total time per man paid for in the guaranty period than in the test period. Because of the foregoing facts, the increase from the test period to the guaranty period in cost of labor per unit of work accomplished on all railways, including that of the consolidated companies, was much in excess of the increase in cost of labor per unit of time. The Commission had full knowledge of the foregoing facts, but intentionally and deliberately failed and refused to consider or determine the amount of such excess. The excess in the paid-for time required to accomplish any given amount of work in the guaranty period over the paid-for time required for the same work in the test period, due to the foregoing facts, was not less than 15 per cent in the case of the consolidated companies, and entitled petitioner under said Section 209 and under paragraph 5 of said standard contract to an allowance for increase of maintenance expenses of not less than $2,000,000 in addition to all allowances considered and determined by the Commission and included in any of its said certificates. Petitioner claimed such an allowance, in its said claim filed February 11, 1921, as aforesaid, but the Commission wholly failed and refused to consider or determine said claim, or the facts alleged therein.

[fol. 30]

XVIII

On June 22, 1925, the Secretary of the Treasury of the United States demanded payment by petitioner of $1,321,-112.69 in refund of the difference between the amount paid to petitioner as aforesaid and the amount due petitioner as stated in said order of June 17, 1925. On July 8, 1926, the said Secretary of the Treasury demanded payment by petitioner of $1,329,785.98 in refund of the difference between the amount paid to petitioner as aforesaid and the amount due petitioner as stated in said order of June 8, 1926.

The Comptroller General of the United States, acting upon the supposed authority of said certificate of the Commission of June 17, 1925, and without any other authority whatsoever, did on October 26, 1925, wrongfully and unlawfully notify petitioner that all amounts due to petitioner from the United States on account of mail, freight and passenger transportation and other earnings would be withheld from payment to petitioner pending the liquidation or satisfaction of the said alleged indebtedness from petitioner to the United States, and thereupon said Comptroller General did withhold amounts which were earned by and which became due to petitioner from the United States for mail, freight and passenger transportation up to and until the 26th day of October, 1926, in the sum of more than two million dollars and refused to pay or permit the payment of said sums or any part thereof to petitioner until and unless peti- [fol. 31] tioner would enter into an agreement with the said Comptroller General for pledging of the said Liberty bonds or government securities in an equal amount with the Comptroller General to secure the refund by the petitioner to the United States of the excess of the advances and partial payments made to petitioner as aforesaid, over the amount of the guaranty as certified in the said order of the Commission of June 8, 1926 (which said excess is $1,329,785.98), with interest, in the event that the validity of the claim of the United States for said refund should be determined in this action or in any action brought against the United States to test the validity of such claim for such refund, by a court of last resort having jurisdiction of the matter or by agreement of the parties. Thereupon and solely for the purpose of obtaining said payments so withheld and under duress for the reasons above stated, petitioner entered into an agreement with the Comptroller General, a copy of which is hereunto attached and marked "Exhibit D" and made a part hereof, and did pledge and deposit with said Comptroller General bonds owned by petitioner as provided for in said agreement. If petitioner had brought actions against the United States to recover the amounts due it for said mail, freight and passenger transportation it would have required a multiplicity of actions and the United States would have pleaded a counterclaim against petitioner in said actions for the said refund

based upon the said certificate of the Commission of date [fol. 32] June 8, 1926, and petitioner is advised by its counsel that it could not have attacked said order collaterally in such actions but that an action in the nature of this proceeding now brought would have been necessary to cancel the said order of the Commission and to avoid such counterclaim. The said Comptroller General has refused and still refuses to deliver said Liberty bonds to the petitioner until the invalidity of the order of the Commission is determined by final court action. Petitioner has no other remedy for setting aside or determining the invalidity of said order.

In consideration whereof, and forasmuch as petitioner is remediless in the premises at and by the strict rules of the common law and to the end that it may obtain the relief to which it is entitled, petitioner prays that a decree be entered herein setting aside, annulling and suspending said certificate and order of June 8, 1926, a copy of which is attached hereto and marked "Exhibit C," and that defendant be restrained and enjoined from disposing of any of said Liberty bonds, and from withholding from petitioner the said Liberty bonds and the interest coupons thereon; and any thereof; and that defendant be restrained and enjoined from withholding any payments due from the United States to petitioner and from asserting the said certificate of the Commission as an offset against any such indebtedness, and that the use of said order or certificate for any purpose whatever by the United States, or any official thereof, be perpetually enjoined, and for such other [fol. 33] and further relief as justice and equity may require.

Great Northern Railway Company, by F. G. Dorety, Thomas Balmer, Fletcher Rockwood, Solicitors.

November 12, 1926.

[fol. 34] *Duly sworn to by G. R. Martin. Jurat omitted in printing.*

[fol. 35] EXHIBIT "A" TO PETITION

Interstate Commerce Commission, Washington

Finance Docket No. 501. Certificate No. A-329

Certificate of Interstate Commerce Commission under Section 209 (g), Transportation Act, 1920, as Amended by Section 212.

To the Secretary of the Treasury of the United States:

1. The Commission hereby certifies that it has this date cancelled certificate No. A-328, dated the 23rd day of February, 1921, which certified to the Secretary of the Treasury of the United States a payment of six million dollars ($6,000,000) in favor of the Great Northern Railway Company.

2. The Interstate Commerce Commission, hereinafter called the Commission, hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, hereinafter called the carrier, is a carrier as defined in paragraph (a) of section 209 of the Transportation Act, 1920, in that it is a carrier by railroad whose railroad or system of transportation was under Federal control at the time such Federal control terminated at 12:01 [fol. 36] A. M. on March 1, 1920; that the carrier filed with the Commission on or before March 15, 1920, a written statement that it accepted all of the provisions of the said section 209.

3. The Commission has ascertained and hereby certifies to the Secretary of the Treasury that the amount of six million dollars ($6,000,000) in addition to any other sum or sums heretofore certified in favor of the carrier under section 209 of the Transportation Act, 1920, is necessary to make good to said carrier the guaranty provided by the said section.

4. The Commission hereby certifies that such amount of six million dollars ($6,000,000) cannot be reduced by further accounting or otherwise, and there may be, upon further investigation, additional amounts found due to said Great Northern Railway Company to make good to said

carrier the guaranty of section 209 of the Transportation Act, 1920, and which if, and when, ascertained by the Commission will be certified to the Secretary of the Treasury.

Dated this 1st day of March, 1921.

(S.) George B. McGinty, Secretary.

By the Commission, Division 4.

[fol. 37] EXHIBIT "B" TO PETITION

Interstate Commerce Commission, Washington

Finance Docket, No. 510. Certificate No. A-1041

Certificate of Interstate Commerce Commission under Section 209 (g), Transportation Act, 1920

To the Secretary of the Treasury of the United States:

1. The Interstate Commerce Commission, hereinafter called the Commission, hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, The Farmers' Grain & Shipping Company, a corporation of the State of North Dakota, and the Watertown & Sioux Falls Railway Company, a corporation of the State of South Dakota, hereinafter called the carriers are carriers as defined in paragraph (a) of section 209 of the Transportation Act, 1920; and that the carriers filed with the Interstate Commerce Commission on or before March 15, 1920, written statements that they accepted all of the provisions of said section 209 and that the two companies passed by their respective boards of directors authorizing the Great Northern Railway Company to act as their agent in effect-[fol. 38] ing settlement under said section 209 and to receive payment of any sum or sums due them thereunder; said companies being under common control through direct or indirect ownership of their capital stock and composing a single system of transportation.

2. The Commission has ascertained, and hereby certifies to the Secretary of the Treasury that the amount of eleven million, one hundred and seventy-eight thousand, eight hundred and eighty-seven dollars and thirty-one cents ($11,

178,887.31) is the amount necessary to make good to said carriers the guaranty provided by section 209 of the Transportation Act, 1920.

3. The Commission has heretofore certified to the Secretary of the Treasury as advances under section 209 (h) an aggregate amount of six million five hundred thousand dollars ($6,500,000) as follows:

Certificate No. 65, June 25, 1920	$3,000,000
Certificate No. 225, August 31, 1920	2,000,000
Certificate No. 276, November 4, 1920	1,500,000

and as partial payment under section 209 (g) as amended by section 212, an amount of six million dollars ($6,000,000) on March 1, 1921, under certificate No. A-329.

[fol. 39] 4. The Commission hereby certifies that the amount due the United States on account of overpayment to the carrier under section 209 (h) is one million, three hundred and twenty-one thousand, one hundred and twelve dollars and sixty-nine cents ($1,321,112.69).

5. The Commission has made final determination as aforesaid of the amount of the guaranty provided by section 209 of the Transportation Act, 1920.

Dated this 17th day of June, 1925.
By the Commission, Division 4.

—— ——, Secretary.

[fol. 40] EXHIBIT "C" TO PETITION

Interstate Commerce Commission, Washington

Finance Docket No. 501.* Amended Certificate No. A-1041

Amended Certificate of Interstate Commerce Commission under Section 209 (g), Transportation Act, 1920

(Cancels Certificate No. A-1041, Dated June 17, 1925)

To the Secretary of the Treasury of the United States:

1. The Interstate Commerce Commission, hereinafter called the commission hereby certifies that the Great North-

*This certificate also embraces Finance Dockets 463 and 879.

ern Railway Company, a corporation of the State of Minnesota, The Farmers' Grain & Shipping Company, a corporation of the State of North Dakota, and the Watertown & Sioux Falls Railway Company, a corporation of the State of South Dakota, hereinafter called the carriers are carriers as defined in subdivision (a) of section 209 of the transportation act, 1920; and that the carriers filed with the Commission on or before March 15, 1920, written statements that they accepted all of the provisions of said sec-
[fol. 41] tion 209 and that the two companies last mentioned individually filed with the commission resolutions passed by their respective boards of directors authorizing the Great Northern Railway Company to act as their agent in effecting settlement under said section 209 and to receive payment of any sum or sums due them thereunder; said companies being under common control through direct or indirect ownership of their capital stock and composing a single system of transportation.

2. The commission has ascertained, and hereby certifies to the Secretary of the Treasury, that the amount necessary to make good to said Great Northern Railway Company the guaranty provided by section 209 of the transportation act, 1920, is eleven million, one hundred and seventy thousand, two hundred and fourteen dollars and two cents ($11,170,-214.02); that the amount necessary to make good said guaranty to said Farmers' Grain & Shipping Company is thirty-one thousand, four hundred and eighteen dollars and eighty-eight cents ($31,418.88); and that the amount necessary to make good said guaranty to the said Watertown and Sioux Falls Railway Company is seventy-five thousand, six hundred and ninety-eight dollars and eighty-nine cents ($75,-698.89).

[fol. 42] 3. The commission has heretofore certified to the Secretary of the Treasury as advances under section 209 (h) to said Great Northern Railway Company an aggregate amount of six million, five hundred thousand dollars ($6,500.00), as follows:

Certificate No. 65, June 25, 1920	$3,000,000
Certificate No. 225, August 31, 1920	2,000,000
Certificate No. 276, November 4, 1920	1,500,000

and as partial payment to said Great Northern Railway Company under section 209 (g), as amended by section 212, an amount of six million dollars ($6,000,000) on March 1, 1921, under Certificate No. A-329.

4. The commission has made final determination as aforesaid of the amount of the guaranty provided for by section 209 of the transportation act, 1920.

—— ——, Secretary.

Dated this 8th day of June, 1926.
By the Commission.

[fol. 43] EXHIBIT "D" TO PETITION

Agreement, dated the 20th day of September, 1926, by and between Great Northern Railway Company, a Minnesota corporation (hereinafter called the Railway Company), party of the first part, and the United States of America (hereinafter called the United States) by the Comptroller General of the United States, party of the second part.

Whereas the United States have asserted a claim against the Railway Company in the amount of approximately $1,329,785.98 with interest at 6% from July 8, 1926, to date of settlement, on account of payments made to the Railway Company under sections 209 and 212 of the Transportation Act, referred to as the Claim of the United States, and

Whereas liability on account of the claim of the United States is denied by the Railway Company and it is understood that an action against the United States to test the validity thereof is contemplated by the Railway Company, and

Whereas the Comptroller General of the United States (hereinafter called the Comptroller General) deems it to be his duty because of the claim of the United States to withhold from the Railway Company payments now due, or to become due, from the United States for transportation of mail, freight and passengers, etc.;

[fol. 44] Now, therefore, in order that such payments due the Railway Company for transportation of mail, freight and passengers may not longer be withheld from the Rail-

way Company, it is agreed and stipulated between the parties hereto as follows:

The Railway Company shall cause to be deposited with the Comptroller General Government securities in the principal sum of $1,625,000 and thereupon, as and when any sums shall be ascertained and allowed and become payable through the General Accounting Office (the Comptroller General), to the Railway Company, payments thereof shall forthwith be made to the Railway Company and not be withheld because of the claim of the United States.

Such Government Securities will be deposited by the Comptroller General with the Treasurer of the United States for safe keeping and as interest shall become due thereon the Comptroller General will cause such interest to be paid to or upon the order of the Railway Company or the coupons representing such interest to be delivered to or upon its order.

The Government securities deposited hereunder by the Railway Company may be withdrawn and other Government Securities equal thereto in principal amount may be substituted therefor, the Government Securities so substituted to be held hereunder in the same manner as those for which substitution was made.

The Government Securities deposited pursuant to this agreement shall be held by the Comptroller General in the [fol. 45] safe keeping of said Treasurer as aforesaid, pending the final determination of the Claim of the United States. Upon such determination, if the same be in favor of the United States, then unless the amount which shall be determined to be payable by the Railway Company shall otherwise be paid by the Railway Company within thirty days thereafter, said Securities shall be sold by the Comptroller General and the proceeds thereof together with any accrued interest thereon be deposited in the Treasury of the United States on account of the amount so determined to be payable by the Railway Company on account of the Claim of the United States. But if said final determination of the Claim of the United States be in favor of the Railway Company then the Government Securities then on deposit hereunder, together with unpaid coupons that may be thereto attached, shall be forthwith delivered to the Railway Company.

In case the amount so finally determined to be payable by the Railway Company to the United States shall be less than the then market value of the Government Securities then on deposit hereunder plus the interest accrued thereon, then the Comptroller General shall sell such an amount of said Securities as shall equal in proceeds (including accrued interest) the amount so finally determined to be payable by the Railway Company to the United States and shall deliver to the Railway Company the remainder of said Securities.

It is further stipulated and agreed that the Government Securities deposited hereunder shall be held and applied [fol. 46] solely for the purpose of this agreement and shall not be subject to or applied by the United States to any other claims or on account of any indebtedness that may hereafter be asserted against the Railway Company, or any subsidiary of the Railway Company, by the United States, or any other agency or branch of the United States Government.

For the purpose of the agreement (1) the Claim of the United States shall be deemed to have been finally determined, or a final determination thereof made, when it shall have been decided by the Court of last resort having jurisdiction thereof or shall have been settled by an agreement in writing between the parties thereto, and (2) "the then market value" on a given day of Government Securities of a particular kind held by the Comptroller General hereunder, shall be the price (exclusive of accrued interest) at which said securities shall have been sold on the New York Stock Exchange at the last sale thereof made on the last preceding day on which sales thereof shall have been made on said Exchange.

A certified copy of a decree of Court making the final determination of the Claim of the United States and/or, as the case may be, a duly attested copy of any agreement entered into between the Railway Company and the United States, whereby said claim shall be finally settled shall be deemed to be satisfactory evidence of the final determination thereof.

This agreement shall not be construed as a recognition by the Railway Company of the right of the United States [fol. 47] to withhold from the Railway Company the pay-

ment of any moneys on account of the Claim of the United States, nor as an admission by the Railway Company of the validity of said claim or of any claim that any moneys are due or will become due to the United States on account of said payments made to the Railway Company under Sections 209 and 212 of the Transportation Act.

The Government Securities deposited hereunder shall remain on deposit for the purpose of this agreement, anything herein contained to the contrary notwithstanding, and the Railway Company agrees that it will not bring any suit or action for the recovery or re-delivery to the Railway Company of said Securities or any of them or of any proceeds thereof prior to the final determination of the claim of the United States, saving and excepting such suit or action as may be necessary to or brought to determine the validity of said claim.

In the event that the determination of the Claim of the United States is delayed to such an extent that the par value of the Government Securities on deposit pursuant to this agreement shall at any time be less than a sum equal to the amount of such claim plus interest thereon computed at the rate of six per cent (6%) per annum from July 8, 1926, then, upon written notice from the Comptroller General addressed to it at its office in St. Paul, Minnesota, the Railway Company will deposit with the Comptroller General additional Government Securities, the par value of which shall be sufficient to make up such deficiency.

[fol. 48] Any commissions or other expenses payable on account of the sale of Government Securities held hereunder shall be deducted from the proceeds thereof.

This agreement shall be binding upon the successors and assigns of the parties hereto.

In witness whereof, said Great Northern Railway Company has caused this agreement to be signed in its name by its President and its corporate seal to be affixed and to be attested by its Secretary, and the United States of America has caused this agreement to be signed in its name by the Comptroller General of the United States, all as of the day and year first above written.

Great Northern Railway Company, by F. G. Dorety, Vice-President. Attest: F. L. Paetzold, Secretary. United States of America, by J. R. McCarl, Comptroller General of the United States.

The Treasurer of the United States will accept from the Comptroller General of the United States deposit of said Government Securities under the aforesaid agreement.

[File endorsement omitted.]

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION OF INTERSTATE COMMERCE COMMISSION—Filed December 10, 1926

To the Honorable the Judges of said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150, we hereby enter the appearance of the Interstate Commerce Commission, as a party defendant, and of ourselves as its counsel, in the above entitled suit.

P. J. Farrell, Daniel W. Knowlton.

[File endorsement omitted.]

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed December 10, 1926

The Interstate Commerce Commission, hereinafter called the Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the petitioner's petition, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answer and says:

I

Answering the opening paragraph and paragraphs I to VI, inclusive, of the petition, the Commission admits for

the purposes of this suit that the allegations therein contained are true except that it denies that its cerificates dated June 17, 1925 and June 8, 1926, respectively issued to the Secretary of the Treasury and referred to in the opening paragraph and paragraph II, purported to fix compensation due to the petitioner under sections 209 and 212 of the Transportation Act, 1920; denies that said sections of said act provide for the fixing of compensation; and denies that said certificates are orders or acts of the Commission within the meaning of the Act of October 22, 1913, entitled "An Act Making Appropriations to Supply Urgent Deficiencies in Appropriations for the Fiscal Year 1913 and for Other Purposes" or within the meaning of any other act of Congress authorizing the setting aside, annulling, suspending or enjoining of orders or acts of the Commission.

[fol. 51] II

Answering paragraph VII the Commission disclaims information sufficient to form a belief as to the correctness of the allegations therein contained and therefore neither admits nor denies the truth thereof.

III

Answering paragraph VIII, the Commission admits that pursuant to its order entered in a proceeding entitled "In the Matter of Settlements with Carriers under the Provisions of Section 209 of the Transportation Act of 1920," the petitioner, on February 11, 1921, filed with the Commission a verified return purporting to show that one-half of its average annual railway operating income, hereinafter called standard return, for the three years ended June 30, 1917, hereinafter called test period, was $14,333,340.54; that the amount of increase in such compensation provided in Section 4 of said act was $509,217.46; and that petitioner had an operating deficit during the guaranty period of $3,655,833.67. Further answering said paragraph the Commission admits that the total amount claimed to be due petitioner in said return without deduction for advances theretofore made was the sum of $18,498,391.67. Except as so admitted the Commission denies the truth of each of and all the allegations contained in said paragraph.

IV

Answering paragraph IX, the Commission admits that on March 1, 1921, it issued the certificate, copy whereof is attached to the petition marked Exhibit A; admits that the petitioner presented such certificate to the Secretary of the Treasury and received payment of $6,000,000 in accordance therewith; admits and alleges that it was not then able finally to determine the whole amount due the petitioner [fol. 52] under section 209 of the Transportation Act, 1920. The Commission denies that it then, or at any time, definitely ascertained that the sum of $6,000,000 was due to petitioner under said section 209 in addition to the payments theretofore mentioned in said petition and in addition to any further sums that might later be determined upon, and denies that in and by said Exhibit A, or otherwise, the Commission issued its certificate to that effect, as alleged. The Commission on the contrary alleges that by reason of the nature of the transactions involved and of the fact, shown in the petition, that it was not then able to finally determine the total amount due the petitioner under said secion 209, it could not and did not, in and by said certificate, or otherwise, definitely make a final ascertainment that said sum of $6,000,000, or any part thereof, was due to the petitioner under said section.

V

Answering the first four sentences of paragraph X, the Commission admits the truth of the allegations therein contained. Further answering said allegations, however, the Commission alleges that the petitioner subsequently admitted that the sum of $17,599,756.42, or as revised, $17,-421,650.35, claimed by petitioner in its statement so filed with the Commission, was too high in that in its "Petition for Reargument before the Entire Commission" dated July 2, 1925, it contended that the sum of $15,705.688, there said to have been previously found by the Commission as the probable allowance, "was approximately correct and that the amount necessary to make good the guarantee under section 209 of the Transportation Act is at least $15,000,000."

As to the last sentence of said paragraph the Commission avers that the allegations therein contained are irrelevant and immaterial for the reason that, even if the Commission in and by its said certificate, or otherwise, had purported to definitely ascertain or finally determine that said sum of $6,000,000 so paid to the petitioner was the [fol. 53] minimum amount due petitioner under said section 209, which is always denied, the United States would not be foreclosed by such mistake of fact and law in the part of its agent from recovering from petitioner that part of said sum which was later found and finally ascertained to constitute an overpayment under the terms of said section. The Commission therefore neither admits nor denies the allegations contained in said last sentence of paragraph X of the petition.

VI

Answering paragraph XI, the Commission admits that the allegations therein contained are true except that it denies that its acts therein referred to, or any of them, were or was wrongfully, or unlawfully performed or without jurisdiction or authority in the premises. The Commission alleges on the contrary that it did have jurisdiction and authority to perform each of and all the acts therein referred to and that it was constrained so to do by the duties imposed upon it by said sections 209 and 212 of the Transportation Act, 1920. Further answering and with a view to clarifying the allegations of said paragraph, the Commissioner alleges that in its said certificate of June 8, 1926, Exhibit C, naming the sum of $11,170,214.02 as due the petitioner, it likewise certified that the total sum due petitioner and the two other corporations named in said paragraph, for which petitioner was the authorized agent, was $11,277,331.79.

VII

Answering paragraph XII, the Commission denies each of and all the allegations therein contained. Further answering said paragraph the Commission alleges that the aggregate of the payments named as due the petitioner in

the Commission's certificates issued prior to June 17, 1925, exceed the amounts necessary to discharge the obligations of the United States to petitioner under sections 209 and 212 of the Transportation Act, 1920, in the amount shown by the certificate of June 8, 1926; and that the certificate of March 1, 1921, did not and does not constitute a final adjudication that the amount named therein was due to petitioner.

[fol. 54] VIII

Answering that portion of paragraph XIII down to and including the words "The properties of petitioner and of all of said American subsidiaries were under Federal control during the full period thereof" the Commission admits the truth of the allegations therein contained.

Answering that portion of paragraph XIII following the words above quoted down to and including the words "Railway operating revenues of said Canadian subsidiaries during Federal control," the Commission admits that the allegations therein contained are substantially correct, except that it denies that the compensation provided for by petitioner's said contract with the Director General of Railroads included interest upon amounts expended for additions, betterments and road extensions for any period other than the period from January 1, 1918, to March 1, 1920, inclusive. For exact and definite information in respect of the provisions of said contract, the Commission respectfully refers the court to the certified copy thereof hereto attached marked Exhibit A.

Answering that portion of paragraph XIII following the words last above quoted down to but not including the last two sentences in said paragraph, the Commission admits and alleges that, in certifying the payments therein referred to, its determinations in respect of net railway operating income, increases provided for by section 4 of the Federal Control Act and amounts to be included in operating expenses under paragraph (3) of section 209 of the Transportation Act, 1920, attributable to the petitioner's operation during the test and guaranty periods, were made in a manner consistent with the petitioner's said contract with the Director General of Railroads, as is required by sections 209 and 212 of the Transportation

Act, 1920, and that the annual compensation named in said contract included the compensation due to petitioner as well as to the nine subsidiary companies which were parties to said contract. Except as so admitted, the Commission denies the truth of each of and all the allegations contained in said portion of paragraph XIII and expressly denies that it made any determination of just compensation [fol. 55] under paragraph (e), (1) or that said paragraph, or any other paragraph of said section 209 required it to make any determination of just compensation.

Answering the last two sentences of paragraph XIII the Commission admits that the petitioner is entitled to represent in this proceeding the companies mentioned to the extent that said companies are vested with any interest under said section 209. Except as so admitted the Commission disclaims information sufficient to form a belief as to the correctness of said allegations or any of them and therefore neither admits nor denies the truth thereof.

IX

Answering paragraph XIV the Commission admits the truth of the allegations therein contained except in the following particulars:

The Commission denies that in making its certificates for payments due petitioner and the companies represented by petitioner under said section 209, it failed and refused to fully determine and include therein the additional amount provided for in section 4 of the Federal Control Act, as required to do by paragraph (e), (1) of said section; the Commission alleges that on the contrary it fully determined and included in said certificate all such additional amounts as were required or intended to be made by said section 209;

The Commission denies that said contract between petitioner and the Director General did not contain the waiver referred to in the quotation taken from its decision of June 8, 1926; the Commission alleges that on the contrary said contract contained a waiver by all of the railroads parties thereto of interest in respect of additions and betterments upon expenditures for work done prior to January 1, 1918, except to the extent that the same was allowed and included

in the compensation provided for in paragraph (a) of section 8 of said contract;

[fol. 56] The Commission denies that the petitioner is entitled to a payment of any sum whatsoever from the United States under said section 209, in addition to the payments certified to be due it in the Commission's certificate of June 8, 1926.

X

Answering that portion of paragraph XV down to and including the sentence "The property described in paragraph (a) of Section 2 of said contract of December 30, 1918, included the said railways of petitioner and its American subsidiaries," the Commission admits the truth of the allegations therein contained except that it denies that the allegation in respect of the provisions of paragraph (f), (3) of said section 209 contains a full and complete statement of the provisions of said paragraph; and for information concerning said provisions the Commission refers the court to the language of the act.

Answering the remaining portion of paragraph XV the Commission admits and alleges that in making said certificates it determined certain ratios representing allowances for differences in cost of labor and material, amount of property maintained, and use of said property, found to exist between the test period and the guaranty period and applied said ratios to maintenance expenditures during one-sixth of the entire test period and not to said guaranty months of the test period; that in its decision of June 8, 1926, it found and declared that the claim of petitioner that said ratios should be applied to said guaranty months of the test period could not be considered because the law definitely fixes as a base the average six months of the test period. The Commission denies that the law does not in fact fix as a base the average six months of the test period; denies that the use of such a base is contrary to the spirit and intent of said section 209 or of section 5 of said standard contract; denies that in making the determination referred to, it was governed by an erroneous conclusion of law or acted under a mistaken assumption of its duties under the law; denies that petitioner has been deprived of consideration by the Commis-

sion in respect of any questions of law or discretionary [fol. 57] matters within the authority of the Commission to determine. The Commission alleges that on the contrary section 209 does definitely fix an average six months of the test period as a base for comparison with the six months of the guaranty period; and that it gave full and careful consideration to the claim of petitioner that the guaranty months, instead of an average six months of the test period, should be used as such base and to all questions of law or of discretion involved in the rights of petitioner under said section. Further answering said remaining portion of paragraph XV the Commission alleges that except as above expressly admitted or denied, the allegations therein contained are, and each of them is, irrelevant and immaterial, and therefore neither admits nor denies the truth thereof.

XI

Answering paragraph XVI, the Commission admits and alleges that in determining the ratio representing the increase in price of labor and materials applied to maintenance of petitioner's property in the guaranty period, as compared with the test period, it fixed an equation factor of 2.45 to 1 to express that increase; that in arriving at said factor it gave consideration, among other things, to maintenance expenditures of the petitioner and other railroads within certain territorial bounds. Except as so admitted, the Commission denies the truth of each of and all the allegations contained in said paragraph; and in particular denies that, considered as a whole, substantial differences existed between the circumstances and conditions under which the petitioner performed its maintenance work and those obtaining generally within said territorial bounds. Further answering said paragraph the Commission alleges that said equation factor of 2.45 to 1 is somewhat higher than the territorial factor determined by it to be generally applicable to railroads within such territorial bounds and that the difference between said factors fully represent such differences as may have existed between the circumstances and conditions under which petitioner performed its maintenance work and those obtaining generally within said territorial bounds.

[fol. 58] XII

Answering paragraph XVII the Commission alleges that each of the allegations therein contained is irrelevant and immaterial and therefore neither admits nor denies that any of said allegations is true.

XIII

Answering paragraph XVIII the Commission disclaims information sufficient to form a belief as to the correctness of the allegations therein contained and therefore neither admits nor denies the truth thereof.

Except as herein expressly admitted, or alleged to be irrelevant and immaterial, the Commission denies each of and all the pertinent and material allegations contained in the petition, in so far as they conflict either with the allegations of the Commission herein contained or with the statements of fact included in the Commission's report entitled Guaranty Settlement with Great Northern Railway Company, 111 I. C. C. 318.

As a further and separate answer to said petition, the Commission alleges that its certificates of June 17, 1925, and June 8, 1926, issued to the Secretary of the Treasury, are not orders or acts of the Commission within the meaning of the act of October 22, 1913, entitled "An Act Making Appropriations to Supply Urgent Deficiencies in Appropriations for the Fiscal Year 1913 and for other Purposes", or within the meaning of any other Act of Congress authorizing the setting aside annulling, suspending or enjoining of orders or acts of the Commission; and that said sections 209 and 212 of the Transportation Act, 1920, do not vest the petitioner with such interest as entitles it to institute a suit against the United States in a court of equity to set aside annul, suspend or enjoin certificates issued by the Commission thereunder.

All of which matters and things the Commission is ready to aver, maintain and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by Daniel W. Knowlton, Assistant Chief Counsel. P. J. Farrell, of Counsel.

[fol. 59] *Duly sworn to by Balthasar H. Meyer. Jurat omitted in printing.*

[fol. 60] Exhibit "A" to Answer of I. C. C.

Agreement Between the Director General of Railroads and the Great Northern Railway Company and Other Corporations—December 30th, 1918

Contract Custodian's No. 1003

[fol. 61] Contents

	Page
Preamble and recitals	1
Section 1. Privity, alterations, definitions, etc.	3
Section 2. Property taken over	4
Section 3. Acceptance	6
Section 4. Operation and accounting during Federal control	7
Section 5. Upkeep	11
Section 6. Taxes	13
Section 7. Canadian Companies	14
Section 8. Compensation	17
Section 9. Claims for loss on additions, etc.	19
Section 10. Final accounting	21
Execution	22

[fol. 62] Preamble and Recitals

This agreement, made this 30th day of December, 1918, between William G. McAdoo, Director General of Railroads, hereinafter called the Director General, acting on behalf of the United States and the President, under the powers conferred by the proclamations of the President hereinafter referred to, party of the first part, and the Great Northern Railway Company (hereinafter called the "Company"), Duluth Terminal Railway Company, Minneapolis Western Railway Company, Minneapolis Belt Line Company, Great Northern Terminal Railway Company, and Great Northern Equipment Company, Minnesota corporations; The Duluth & Superior Bridge Company, a Wisconsin corporation; Watertown & Sioux Falls Railway Com-

pany, a South Dakota corporation; Montana Eastern Railway Company, and the Great Falls & Teton County Railway Company, Montana corporations (hereinafter called the "Companies"), parties of the second part:

Witnesseth that—

(a) Whereas by a proclamation dated December 26, 1917, the President, acting under the powers conferred on him by the Constitution and laws of the United States, by the joint resolutions of the Senate and House of Representatives bearing date April 6 and December 7, 1917, respectively, and particularly under the powers conferred by section 1 of the act of Congress approved August 29, 1916, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," took possession and assumed control at 12 o'clock noon on December 28, 1917, of certain railroads and systems of transportation, including the railroads and transportation systems of the Companies and the appurtenances thereof, and directed that the possession, control, operation, and utilization of the transportation systems thus taken should be exercised by and through William G. McAdoo, appointed Director General of Railroads; and

(b) Whereas the Congress of the United States, by an act approved March 21, 1918, hereinafter called the Federal control act, has authorized the President to enter into agreements with the companies owning the railroads and systems thus taken over for the maintenance and upkeep of the same during the period of Federal control, for the determination of the rights and obligations of the parties to the agreement arising from or out of Federal control including the compensation to be received or guaranteed, and for other purposes, as in said act more fully set out, and authorized the President to exercise any of the powers by said act or theretofore granted him with relation to Federal control through such agencies as he might determine; and

(c) Whereas by a proclamation dated March 29, 1918, the President, acting under the Federal control act and all other powers him thereto enabling, authorized the Director General either personally or through such divisions, agencies, or persons as he may appoint, and in his own name or in the name of such divisions, agencies, or persons, or in

the name of the President, to agree with the carriers, or any of them, or with any other person in interest, upon the amount of compensation to be paid pursuant to law, and to sign, seal, and deliver in his own name or in the name of the President or in the name of the United States such agreements as may be necessary and expedient with the several carriers or other persons in interest respecting com- [fol. 63] pensation, or any other matter concerning which it may be necessary or expedient to deal, and to make any and all contracts, agreements, or obligations necessary or expedient and to issue any and all orders which may in any way be found necessary and expedient in connection with the Federal control of systems of transportation, railroads, and inland waterways as fully in all respects as the President is authorized to do, and generally to do and perform all and singular the acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject thereof, the President is authorized to do and perform; and

(d) Whereas the Company is the owner of all the issued and outstanding shares (except only the qualifying shares owned by directors or trustees) of the capital stock of each of the Canadian Railway Companies (except The Midland Railway Company of Manitoba) named in paragraph (a) of Section 7 hereof (hereinfter called the "Canadian Companies"), and said Canadian Companies severally own railroads located wholly within the Dominion of Canada which form branches or extensions of the railroads of the Company, and which heretofore have been and now are operated in conjunction with, and as a part of, the Company's system of transportation; and it is the desire of all parties hereto that the unity of operation heretofore and now obtaining with respect to the lines of the Company, and the Canadian Companies shall continue during Federal control; and

(e) Whereas the Director General has found that in order to make Federal control effective, and to determine properly the mutual rights and obligations of the parties hereto, it is necessary to make provision for the continued unified operation during Federal control of the railroads of the Companies and of the railroads of the Canadian Companies; and

(f) Whereas the revenues and expenses of the Canadian Companies heretofore have been, and during the test period were, included and comprehended in the revenues and expenses of the Company, and were by it reported as its own, and the Interstate Commerce Commission has certified to the President the amounts of the average annual railway operating incomes of the said Companies (including the operating incomes of the Canadian Companies as above stated and after deducting the deficit of the Minneapolis Western Railway Company), computed in the manner provided in section 1 of the Federal control act, the aggregate of which amounts is twenty-eight million, seven hundred seventy-one thousand, three hundred sixty dollars and seventy-eight cents ($28,771,360.78), subject to such changes and corrections as the Commission may hereafter determine and certify to be requisite in order that the accounts and reports of the Companies, used by the Commission as the basis of computing said average annual railway operating incomes may be brought into conformity with the accounting rules or regulations of the Commission in force at the time of such accounting, or in order to correct computations based on such accounts or reports.

Now, Therefore, the parties hereto, of the first and second parts, respectively, each in consideration of the agreements of the other herein contained, do hereby covenant and agree to and with each other as follows:

[fol. 64] Section 1—Privity, Alterations, Definitions, etc.

Sec. 1. (a) This agreement shall be binding upon the United Sattes, the Director General and his successors, and upon the Companies, and their respective successors and assigns.

Wherever in this agreement the word "Company" is used, it shall be understood as meaning the Great Northern Railway Company; the words "Affiliated Companies" shall be understood as meaning the nine other corporations, parties to this agreement; the word "Companies" shall be understood as meaning the ten corporations, parties to this agreement; and the words "Canadian Companies" shall be understood as meaning the eight Canadian corporations named in paragraph (a) of section 7 hereof.

The rights and obligations of the Companies in this agreement contained are several, not joint. The Company owns all the stock, except directors' or trustees' qualifying shares, of all the Affiliated Companies. This agreement shall not be construed as creating any right, claim, privilege, or benefit against any party hereto, or against the Canadian Companies in favor of any state or any subdivision thereof, or of the Dominion of Canada or any province or subdivision thereof, or of any individual or corporation other than the parties hereto.

(b) The provisions of this agreement may be altered, amended, or added to by and only by mutual consent signified by instruments in writing signed by the Director General and by some officer of the Company thereto duly authorized by the Board of Directors of the Company.

(c) Wherever in this agreement the word "Commission" is used it shall be understood as meaning the Interstate Commerce Commission, acting by divisions or otherwise as authorized by law; but any party shall have the right to have the decision of any division reviewed by the Commission sitting as a whole.

(d) Wherever in this agreement the words "Federal control" are used to indicate a period of time, they shall be understood as meaning the period from 12 o'clock midnight of December 31, 1917, to and including the day and hour on which said control shall cease.

(e) Wherever in this agreement the words "test period" are used, they shall be understood as meaning the period between July 1, 1914, and June 30, 1917, both inclusive.

(f) Wherever in this agreement the words "standard return" are used, they shall be understood as meaning average annual railway operating income, computed in the manner provided in section 1 of the Federal control act, and ascertained and certified by the Commission.

(g) Wherever in this agreement, the words "Director General" are used, they shall be understood as designating William G. McAdoo, or such other person as the President may from time to time appoint to exercise the powers conferred on him by law with relation to Federal control, or

such agents or agencies as the Director General may from time to time appoint for the purpose; and wherever by this agreement any notice is to be given by the Director General, the same may be given in his name by any subordinate thereto duly authorized.

(h) Wherever the property of any of the Companies is referred to in this agreement it shall be understood as including all the property described in paragraph (a) of section 2 hereof, whether owned by or leased to the Companies, and, where the context permits, all additions or betterments thereto or extensions thereof made during Federal control; and as to all such leased property the Companies shall have the benefit of and be subject to all the obligations and provisions of this agreeemnt and shall be subject to all duties imposed by law in respect of such leased property.

(i) The descriptive words at the heads of the several sections of this agreement and the table of contents are inserted for convenience merely, and are not to be used in the construction of the agreement.

[fol. 65] Section 2—Property Taken Over

Sec. 2. The railroads and systems of transportation of the Company and of its said Affiliated Companies of which the President has taken over possession, use, control, and operation shall be considered as including:

(a) The following roads and properties:

1. The railroads of the Great Northern Railway Company commencing at Duluth, Minnesota, and Superior, Wisconsin, and St. Paul, Minnesota, and extending southwesterly to Sioux City, Iowa, and Yankton, South Dakota, and westerly through or into the states of Minnesota, South Dakota, North Dakota, Montana, Idaho, Washington and Oregon;

2. The railroad of the Duluth Terminal Railway Company located within the city of Duluth, Minnesota;

3. The railroad and bridge of The Duluth & Superior Bridge Company crossing the St. Louis River and connecting the cities of Superior, Wisconsin, and Duluth, Minnesota;

4. The railroad and bridge of the Minneapolis Western Railway Company crossing the Mississippi River and located within the city of Minneapolis, Minnesota;

5. The roundhouses, yards and other terminal facilities of the Minneapolis Belt Line Company located at or near Fridley, Minnesota;

6. The freight warehouses, stations, yards, tracks and other terminal facilities of the Great Northern Terminal Railway Company located in the city of St. Paul, Minnesota;

7. Locomotives, freight, passenger and other cars and equipment, wherever located, of the Great Northern Equipment Company;

8. The railroad of the Watertown & Sioux Falls Railway Company, commencing at Watertown, South Dakota, and extending to Sioux Falls, in said state;

9. The railroad of the Montana Eastern Railway Company commencing at Snowden and extending to Richey, Montana, with a branch from Fairview to Watford City, North Dakota;

10. The railroad of the Great Falls & Teton County Railway Company extending from Bynum, Montana, to Pendroy, Montana;

together with all branches and tracks, trackage, bridge, and terminal rights, and lines of railroad owned by or leased to and operated by any of the Companies as a part of their systems of transportation, and all other property of the Companies, with the appurtenances thereof, whether included in the foregoing list or not, the revenues of which were used, or which, if the property had been then owned by or leased to the Companies and had then been revenue bearing, would have been used, in computing the standard return of any of the Companies.

Each of the Companies reserves to itself the benefit of all leases (and of all rents and revenues accruing therefrom) of parts of its right of way, station grounds, and other property, the revenues from which under the accounting rules of the Commission in force during the test period

were properly creditable to "miscellaneous rent income" or "miscellaneous income." Each of the Companies grants to the Director General all its rights to terminate leases [fol. 66] of any part of its right of way, yards, or station grounds, and to occupy and use the premises of any such lessee when, in his judgment, the same is required for operating purposes. Each of the Companies shall have for its own benefit the right to lease for industrial sites or other purposes such portion of its right of way, yards, or station grounds, or structures thereon as are not required by the Director General for operating purposes, and to receive and enjoy the rentals therefrom, subject to the right of the Director General to cancel any such lease and to occupy the premises or structures whenever, in his judgment, the same are necessary for operating purposes. All expenses connected with any such property heretofore or hereafter leased or otherwise occupied, as in this paragraph provided, including taxes thereon which during the test period were not charged to railway tax accruals, shall be paid by the Companies while receiving the revenues therefrom.

(b) All materials and supplies on hand at midnight December 31, 1917.

(c) All balances in the account or accounts representing the total of "Net balance receivable from agents and conductors" as of midnight December 31, 1917.

[fol. 67] Section 3—Acceptance

Sec. 3 (a) The Companies accept all the terms and conditions of the Federal control act and any regulation or order made by or through the President under authority of said act or of that portion of the act approved August 29, 1916, referred to in paragraph (a) of the preamble to this agreement which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation; and they further and expressly accept the covenants and obligations of the Director General in this agreement set out and the rights arising thereunder in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights, at law or in equity, which they or any of them now have or hereafter can have, other-

wise than under this agreement, against the United States, the President, the Director General, or any agent or agency thereof, for compensation under the Constitution and laws of the United States for the taking possession of their property, and for the use, control, and operation thereof during Federal control, and for any and all loss and damage to their business or traffic by reason of the diversion thereof or otherwise which has been or may be caused by said taking or by said possession, use, control, and operation.

No claim is made by the Companies for compensation for the period between noon of December 28 and midnight of December 31, 1917; and the revenues of said period shall belong to the Companies, and the expenses thereof shall be paid by them, allocated in both cases as provided in paragraph (b) of section 4 hereof.

(b) The Companies, on their own initiative or upon the request of the Director General, shall take all appropriate and necessary corporate action to carry out the obligations assumed by them in this agreement or lawfully imposed upon them by or pursuant to the proclamation of December 26, 1917, or by the Federal control act.

(c) The Federal control act being in section 16 thereof expressly declared to be emergency legislation enacted to meet conditions growing out of war, nothing in this agreement shall be construed as expressing or prejudicing the future policy of the Federal Government concerning the ownership, control, or regulation of the Companies, or the method or basis of the capitalization thereof, and the recitals or provisions of this agreement shall not be used, as evidence or otherwise, by or against any party hereto in any pending or future proceeding which involves the acquisition or valuation of the property of any of the Companies or any part thereof; but nothing in this paragraph shall be taken or construed as affecting the settlement and discharge contained in paragraph (a) of this section, nor as limiting or qualifying any of the provisions of said paragraph for the purposes thereof, nor as limiting the use of this agreement as evidence in any proceeding under this agreement or under the Federal control act.

[fol. 68] Section 4—Operation and Accounting During Federal Control

Sec. 4. (a) All amounts received by the Director General under paragraph (c) of section 2 hereof and all other amounts whether received from the Companies in cash or collected or realized upon by him from current operating assets belonging to the Companies or arising from railway operations prior to midnight of December 31, 1917, shall be credited by him to the Companies; and the Director General shall, to the extent of the cash so received or realized, pany and charge to the Companies all expenses arising out of railway operations prior to January 1, 1918, including reparation claims, and, unless objected to by the Company, may pay and charge to the Companies any of such expenses, including reparation claims, in excess of the cash so received or realized. Balances of the above accounts shall be struck quarterly on the last days of March, June, September, and December of each year, and the cash balance found on such adjustments to be due either party shall be then payable and, if not paid, shall bear interest at the rate of 6 per cent per annum, unless the parties shall agree upon a different rate; except that the rate of interest on any portion of a balance found due to the Companies which is derived from cash in bank to the credit of the Companies on interest, shall be adjusted in each case independently of this contract as the parties may agree.

(b) Railway operating expenses, reparation and other claims, hire of equipment and joint-facility rents shall be allocated with reference to the time when incurred as between the period prior and subsequent to midnight of December 31, 1917, and as between the period of Federal control and the period subsequent thereto. Railway operating revenues shall be allocated as between the period prior and subsequent to midnight of December 31, 1917, in accordance with the established accrual practices of the Companies; except that where prior to midnight of December 31, 1917, the Companies' part of a service on through business had been completed or carload lots on their own lines had reached destination, the revenue of the Companies for such service shall be allocated to them; but as to classes of

traffic where in the opinion of the Director General such allocation will involve undue delay or undue absorption of accounting labor, such revenues shall be allocated in accordance with the established accrual practices of the Companies. Like methods of accruing and allocating such revenues shall be made at the end of Federal control.

(c) All expenditures made by the Director General during Federal control for additions and betterments, exclusive of equipment, or for extensions begun prior to January 1, 1918, shall be charged to the Companies, and if the completion of any such addition, betterment, or extension is approved or ordered by the Director General, the Company shall be entitled under the provisions of paragraph (d) of section 8 hereof to interest on the cost thereof from the completion of the work; but no interest (except to the extent that the same may be allowed and included in the compensation provided for in paragraph (a) of section 8 hereof) shall be due the Company upon any such expenditures for work done prior to January 1, 1918. Payments for all equipment ordered or under construction by any of the Companies prior to January 1, 1918, but delivered on or after that date, shall also be considered as expenditures made by order or approval of the Director General under paragraph (d) of section 8 hereof. Interest during construction payable under this paragraph, and also interest during construction on the cost of any additions, betterments, and road extensions made by the Companies or at their expense to the Companies' property during Federal control, shall be included in the cost of the work.

[fol. 69] (d) Cash receipts or disbursements and other items arising out of transactions which do not enter into or form a part of those used in determining the Companies' standard return shall not be received or paid by the Director General unless such transactions are negotiated or conducted by his order for account of the Companies and with the consent of the Company. When moneys are so received or paid by the Director General in connection with such corporate transactions they shall be credited or charged to the Companies. There shall be an accounting of the amounts due by or to any of the parties under this para-

graph at the end of each quarter year of Federal control, and the amount so found due shall be then payable and if not paid shall bear interest as provided in paragraph (a) of this section.

(e) All sums paid by the Director General to maintain pension funds or pension obligations or practices, and all contributions to Young Men's Christian Associations of employees, employees' savings funds, relief funds or associations, reading rooms, or health, accident, or death benefits for employees, shall be treated as a part of railway operating expenses during Federal control.

(f) All salaries and expenditures incurred by the Companies during Federal control for purposes which relate to the existence and maintenance of the corporations, or to the properties of the Companies not taken over by the President, or to negotiations, contracts, valuations, or any business controversy with the Government or any branch thereof, and which are not specially authorized by the Director General, shall be borne by the Companies; except that the expenses of valuation now being made by the Commission to the extent that they are, in the opinion of the Director General, necessary to comply with the valuation orders and other requirements of the Commission and to the cooperation of the Companies in the making of such valuation, shall be paid by the Director General as a part of railway operating expenses. If the Company is dissatisfied with the ruling of the Director General it may appeal to the Commission, whose decision shall be final.

(g) The Director General shall furnish for additions, betterments and road extensions to the Companies' property approved or ordered by him any of the materials and supplies taken over under paragraph (b) of section 2 hereof, or purchased by him and held for use in connection with the Companies' property, in so far as, in his judgment, he can do so with due regard to his own requirements. Materials and supplies so furnished shall be charged to the Companies at cost.

(h) The Director General shall at his option be substituted for the period of Federal control in the place of the Companies in respect of the benefits and obligations of con-

tracts relating to operation in force January 1, 1918 (including contracts made by subsidiaries for the use and benefit of the Companies and the right to abrogate or change and make new contracts with express companies for the period of Federal control), except as to contracts between the Companies and subsidiary companies which shall be considered and treated as arrangements or practices; and the Director General shall in like manner at his option be substituted for such period in respect of the benefits and obligations of arrangements and practices in force during the test period in regard to fuel, materials, and supplies for the operation of the property described in paragraph (a) of section 2 hereof and of any additions, betterments, and road extensions thereto, obtained from any mine, oil field, or other source of supply owned or controlled by the Companies, it being understood that under such arrangements or practices, if availed of by the Director General, he shall, to the extent necessary to offset any increase in the standard return growing out of the furnishing by the Companies or their subsidiaries, during the test period, of fuel, materials, and supplies under an arrangement or practice at less than the then cost or the then market value thereof for railroad purposes, be charged for such fuel, materials, and supplies a price expressed in dollars or cents per unit below or above the then cost or the then market value thereof for railroad purposes (as the [fol. 70] practice of the Companies may have been) in the same amount that the prices charged the Companies during the test period were below or above the then cost or the then market value thereof for railroad purposes; and at the request of the Director General or the Companies the prices for fuel or materials supplied between December 31, 1917, and the execution of this contract shall be adjusted on the foregoing basis: Provided, however, that a source of supply which the Companies had acquired to safeguard their own operations shall not be depleted or reduced for use on other transportation systems, except in cases of emergency to be determined by the Director General, in which event the quantity so used on other transportation systems shall be accounted for to the Companies at the fair value thereof: And provided further, that ma-

terials and supplies secured under contracts which the Companies had made for their own operations shall, so far as practicable, be used on the Companies' property, and that, if used on any other transportation system, materials and supplies of like character shall be furnished by the Director General for use in making such additions, betterments, and road extensions as shall be chargeable to the Companies, and shall be charged at cost under such contracts.

(i) The Director General shall pay, or save the Companies harmless from, all expenses incident to or growing out of the possession, operation, and use of the property taken over during Federal control, except the expenses which under this agreement are to be borne by the Companies. He shall also pay or save the Companies harmless from all rents called in the monthly reports to the Commission equipment rents or joint-facility rents, and all judgments or decree that may be recovered or issued against, and all fines and penalties that may be imposed upon, the Companies by reason of any cause of action arising out of Federal control, or of anything done or omitted in the possession, operation, use, or control of the Companies' property during Federal control, except judgments or decrees founded on obligations of the Companies to the Director General or the United States.

(j) Except as otherwise provided in this agreement the Director General shall save the Companies harmless from any and all liability, loss, or expense resulting from or incident to any claim made against the Companies growing out of any thing done or omitted during Federal control in connection with, or incident to, operation or existing contracts relating to operation; and shall do and perform, so far as is requisite under Federal control for the protection of the Companies, all and singular the things, of which he may have notice, necessary and appropriate to prevent, because of Federal control or of anything done or omitted thereunder, the forfeiture or loss by the Companies of any of their property rights, ordinance rights, or franchises, or of their trackage, lease, terminal, or other contracts involving a facility of operation; but nothing herein contained shall be construed to require the Director General to make any capital expenditure necessary to preserve a

franchise or ordinance right not heretofore availed of by the Companies. The Director General shall also save the Companies harmless from any and all claims for breach of covenant heretofore entered into by the Companies or by any predecessor in title or interest in any mortgage or other instrument in respect to insurance against losses by fire.

Nothing in this or in the preceding paragraph shall be construed to be an assumption by the Director General of, or to make him liable on, any obligation of the Companies to pay a debt secured by a mortgage or any rent under a lease, except rents which during the test period were called in the monthly reports to the Commission equipment rents and joint-facility rents and rents which under the accounting rules of the Commission in force during the test period were classified as operating expenses.

[fol. 71] The Companies shall, during Federal control, pay the rents of any property, held by them under lease or contract, described in paragraph (a) of section 2 hereof, except the rents which during the test period were, under the rules of the Commission, classified as equipment rents or joint-facility rents, and rents which were classified as operating expenses; which excepted rents shall be paid by the Director General. If the lease of, or right to use, any property described in paragraph (a) of said section 2 expires during Federal control, the companies shall, if possible, and if requested by the Director General, renew the same; the rental, however, of the property in the excepted classes above mentioned shall be paid by the Director General. The Companies shall pay the same amount of rent as was payable at the beginning of Federal control for other property, the lease of or right to use which is renewed at the request of the Director General, but any increases in the rental of such other property shall be paid by the Director General.

(k) In carrying out the provisions of paragraphs (a), (b), (c), and (d) of this section and the provisions of section 6 hereof the Director General shall not settle any claim by or against the Companies against the objection in writing of the president or of any other duly authorized officer of the Company. The conduct of all litigation before any court or commission arising out of such disputed

claims, or out of operation prior to Federal control, shall be in charge of the Director General's legal force and the expense thereof shall be paid by the Director General; but the Companies may, at their own expense, employ special counsel in connection with any such litigation.

(l) Nothing in this agreement shall be construed as inconsistent with the provision in section 10 of the Federal control act that no process, mesne or final, shall be levied against any property under Federal control, nor as a waiver by the United States of any claim that might otherwise be made by it that the rights of any state or subdivision thereof or of any individual or corporation have been abrogated or suspended by the taking over of the Companies' property or by Federal control.

(m) The Companies shall have the right at all reasonable times to inspect the books and accounts kept by the Director General relating to their property, or to the operation thereof, and the Director General shall during Federal control furnish the Companies with copies of the operating reports relating to their property, and as soon as practicable after the end of each fiscal year shall furnish to the Companies a complete list of their equipment as of the end of such fiscal year.

[fol. 72] Section 5—Upkeep

Sec. 5. (a) During the period of Federal control the Director General shall, annually, as nearly as practicable, expend and charge to railway operating expenses, either in payments for labor and material or by payments into funds, such sums for the maintenance, repair, renewal, retirement, and depreciation of the property described in paragraph (a) of section 2 hereof as may be requisite in order that such property may be returned to the Companies at the end of Federal control in substantially as good repair and in substantially as complete equipment as it was on January 1, 1918: Provided, however, that the annual expenditure and charges for such purposes during the period of Federal control on such property and the fair distribution thereof over the same, or the payment into funds of an amount equal in the aggregate (subject to the ad-

justments provided in paragraph (c) and to the provisions of paragraph (e) of this section) to the average annual expenditure and charges for such purposes included under the accounting rules of the Commission in railway operating expenses during the test period, less the cost of fire insurance included therein, shall be taken as a full compliance with the foregoing covenant.

(b) The Director General may expend such sums, if any, in addition to those expended and charged under paragraph (a) of this section (subject to the adjustments provided in paragraph (c) of this section) as may be requisite for the safe operation of the property described in paragraph (a) of section 2 hereof, assuming a use similar to the use during the test period and not substantially enhancing the cost of maintenance over the normal standard of maintenance of railroads of like character and business during said period; and the amount, if any, of such excess expenditures during Federal control shall be made good by the Companies as provided in paragraph (b) of section 8 hereof.

(c) In comparing the amounts expended and charged under the provisions of paragraphs (a) and (b) of this section with the amounts expended and charged during the test period, due allowance shall be made for any difference that may exist between the cost of labor and materials and between the amount of property taken over and the average for the test period, and, as to paragraph (a), for any difference in use between that of the test period and during Federal control which in the opinion of the Commission is substantial enough to be considered, so that the result shall be, as nearly as practicable, the same relative amount, character, and durability of physical reparation.

(d) At the request of the Director General or the Company there shall be an accounting of the amounts due by or to any of the parties under paragraphs (a) and (b) of this section at the end of each year of Federal control and at the end of Federal control.

(e) If during Federal control any of the property described in paragraph (a) of section 2 hereof or any replacement thereof or addition thereto or betterment or ex-

tension thereof is destroyed or damaged otherwise than by fire or public enemies, and is not restored or replaced by the Director General, he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the loss; and the cost of restoration or replacement, or said value or damage, as the case may be, shall be charged to annual railway operating expenses; it being understood that extraordinary losses caused by floods, explosions, train wrecks or accidents are included in the matters covered by this paragraph, while ordinary losses due to such causes are included in the matters covered by paragraph (a) of this section: Provided, however, that if the Commission on application of the Director General or the Company and after giving due consideration to the practice of the Companies during the test period in [fol. 73] respect to such matters and to any other pertinent facts and circumstances, determines that it is just and reasonable that the said cost or value shall be apportioned or extended over a period of more than one year, this shall be done, and so much of said cost or value as may be apportioned by the Commission over the period subsequent to Federal control, shall be charged to the Companies in the final accounting at the end of Federal control and shall be paid by them.

If, during Federal control, any of the property described in paragraph (a) of section 2 hereof or any replacement thereof or addition thereto or betterment or extension thereof is destroyed or damaged by fire, and is not restored or replaced by the Director General, he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the fire; and the cost of restoration or replacement or said value or damage, as the case may be, shall be charged to annual railway operating expenses, but the same shall not be considered a charge to such expenses for the purposes specified in paragraph (a) of this section.

In case of any such loss or damage by fire, the Director General shall, if given written notice of the requirements of any mortgages, equipment lease, or trust on the property so destroyed or damaged, make such restoration or replacement, or pay such value or damage, in such a way as to meet the requirements of such mortgage, equipment lease,

or trust in the same manner as would have been proper in applying the proceeds of insurance on such property if it had been insured by the Companies against loss or damage by fire in accordance with the terms of such instruments of lien; and a compliance with the written request of the Company in respect thereof shall be a full acquittance of any obligation of the Director General in the premises.

The foregoing parts of this paragraph are subject to the proviso that in case of loss or damage any additions and betterments made in connection with or as a part of the restoration or replacement of property damaged or destroyed and chargeable under the accounting rules of the Commission in force December 31, 1917, to investment in road and equipment, shall be charged to and paid by the Companies.

The Director General shall not be liable to the Companies for any loss or damage due to the acts of public enemies.

(f) If any additions, betterments, or road extensions are made to the property taken over or any equipment is added at the expense of the Companies and with the approval or by order of the Director General during Federal control, he shall expend and charge to railway operating expenses such sums, either in payments for labor and materials or by payments into funds, as may be requisite for the proper maintenance, repair, renewal, retirement, and depreciation of such property until the end of Federal control.

(g) The Companies shall have the right to inspect their property at all reasonable times during Federal control, and the Director General shall provide reasonable facilities for such inspection.

(h) If any question shall arise, either during or at the end of Federal control, as to whether the covenants or provisions in this section contained are being or have been observed, the matter in dispute shall, on the application of the Director General or the Company, be referred to the Commission, which, after hearing, shall make such findings and order as justice and right may require, which shall be final as to the questions submitted and shall be binding on and observed by the parties hereto, except that the Di-

rector General or the Company may take any question of law to the courts, if he or it so desires.

[fol. 74] Section 6—Taxes

Sec. 6. (a) All taxes assessed under Federal or any other governmental authority for the period prior to January 1, 1918, including a proportionate part of any such tax assessed after December 31, 1917, for a period which includes any part of 1917 or preceding years and unpaid on that date, all taxes commonly called war taxes which have been or may be assessed against the Companies under the act of Congress entitled "An act to provide revenue to defray war expenses, and for other purposes," approved October 3, 1917, or under any act in addition thereto or in amendment thereof, and all taxes which have been or may be assessed on property under construction, and all assessments which have been or may be made for public improvements, chargeable under the accounting rules of the Commission in force December 31, 1917, to investment in road and equipment, shall be paid by the Companies; but upon the amount thus chargeable to investment interest shall be paid to the Company during Federal control at the rate provided in paragraph (d) of section 8 hereof. Taxes assessed during construction on additions, betterments, and road extensions made by the Companies with the approval or by order of the Director General during Federal control shall be considered a part of the cost of such additions, betterments, and extensions, and shall, under the provisions of paragraph (d) of section 8 hereof, bear interest as a part of such cost from the date of the completion of such additions, betterments, or extensions. Assessments for public improvements which do not become a part of the property taken over shall bear interest from the date of the payment of such assessment.

(b) If any tax or assessment which under this agreement is to be paid by the Companies is not paid by them when due, the same may be paid by the Director General and deducted from the next installment of compensation due under section 8 hereof. If any taxes properly chargeable to the Director General have been or shall be paid by the Companies, they shall be duly reimbursed therefor.

(c) The Director General shall either pay out of revenues derived from railway operation during the period of Federal control or shall save the Companies harmless from all taxes lawfully assessed under Federal or any other governmental authority for any part of said period on the property under such control, or on the right to operate as a carrier, or on the revenues derived from operation, and all other taxes which under the accounting rules of the Commission in force December 31, 1917, are properly chargeable to "railway tax accruals," except the taxes and assessments for which provision is made in paragraph (a) of this section. The Director General shall pay or save the companies harmless from the expense of all suits respecting the classes of taxes payable by him under this agreement.

(d) If any such tax is for a period which began before January 1, 1918, or continues beyond the period of Federal control, such portion of such tax as may be apportionable to the period of Federal control shall be paid by the Director General, and the remainder shall be paid by the Companies.

(e) Whenever a period for which a tax is assessed cannot be definitely determined, so much of such tax as is payable in any calendar year shall be treated as assessed for such year.

[fol. 75] Section 7.—Canadian Companies

Sec. 7. (a) The Midland Railway Company of Manitoba, a corporation of the Province of Manitoba, Dominion of Canada, owns freight terminals within the city of Winnipeg, Manitoba, and a railroad connecting the same with the railroad of The Canadian Northern Railway Company near the southern boundary of the city of Winnipeg. It has trackage rights over the railroad of The Canadian Northern Railway Company from said point of connection to the connection between the railroad of The Canadian Northern Railway Company with the railroads of the Company and Northern Pacific Railway Company at Emerson Junction, Manitoba, near the International Boundary Line, and near the towns of Emerson, Manitoba, and Noyes, Minnesota.

The Manitoba Great Northern Railway Company, a corporation of the Province of Manitoba, Dominion of Canada, owns and operates a line of railroad extending southerly from Portage la Prairie, Manitoba, to a point on the International Boundary Line, at or near Neche, North Dakota, where it connects with the railroad of the Company; also, it owns and operates a line of railroad from Morden, Manitoba, extending southerly to a point on the International Boundary Line at or near Walhalla, North Dakota, where it connects with the railroad of the Company.

The Brandon, Saskatchewan & Hudson's Bay Railway Company, a corporation of the Dominion of Canada, owns and operates a railroad extending southerly from Brandon, Manitoba, to a point on the International Boundary Line, at or near St. John, North Dakota, where it connects with the railroad of the Company.

The Crows Nest Southern Railway Company, a corporation of the Province of British Columbia, Dominion of Canada, owns and operates a railroad extending southerly from Michel, British Columbia, to a point on the International Boundary Line, at or near Gateway, Montana, where it connects with the railroad of the Company.

The Nelson & Fort Sheppard Railway Company, a corporation of the Province of British Columbia, Dominion of Canada, owns and operates a railroad extending southerly from Nelson, British Columbia, to a point on the International Boundary Line at or near Boundary, Washington, where it connects with the railroad of the Company.

The Red Mountain Railway Company, a corporation of the Province of British Columbia, Dominion of Canada, owns and operates a railroad extending southerly from Rossland, British Columbia, to a point on the International Boundary Line at or near Velvet, Washington, where it connects with the railroad of the company.

The Vancouver, Victoria and Eastern Railway and Navigation Company, a corporation of the Province of British Columbia, Dominion of Canada, owns and operates a line of railroad, together with branches, extending from Vancouver, British Columbia, southerly to New Westminster, and thence through Colebrook to a point on the International Boundary Line at or near Blaine, Washington, where it connects with the railroad of the Company. Also, it

owns and operates a line of railroad extending easterly from Guichon, British Columbia, through Abbottsford, B. C., to a point on the International Boundary Line at or near Sumas, Washington, where it connects with the railroad of the Northern Pacific Railway Company. Also, it owns and operates a line of railroad extending easterly from Abbottsford, B. C., to a connection with the railroad of the Canadian Northern Pacific Railway Company at Cannor, British Columbia, from which point it has trackage rights over the railroad of said last named Company, to Hope, B. C. At Hope, B. C., it owns and operates a terminal and connection to the railroad of the Kettle Valley Railway Company from which point and over which road it has trackage rights to Brookmere. Also, it owns and operates a line of railroad from Brookmere, B. C., extending in a southeasterly direction to a point on the International Boundary Line at or near Chopaka, Washington, where it connects with the railroad of the Company. It also owns and operates those portions of the through line of railroad from Oroville, Washington, to Marcus, Washington, which lie north of the International Boundary Line, said portions north of the Boundary Line extending from a point near Molson, Washington, to Ferry, Washington, and from a [fol. 76] point near Danville, Washington, through Grand Forks Junction, B. C., to a point on the International Boundary Line at or near Laurier, Washington, where it connects with the railroad of the Company, together with branches extending northerly from Grand Forks Junction, to Granby, and Phœnix, B. C.

The New Westminster Southern Railway Company, a corporation of the province of British Columbia, Dominion of Canado, owns and operates a line of railroad extending northerly and southerly from Cloverdale, British Columbia, at which place its railroad connects with the railroad of the Vancouver, Victoria and Eastern Railway and Navigation Company.

(b) During Federal control each of the Canadian Companies shall continue to maintain and operate its aforesaid railroads and appurtenant properties in conjunction and cooperation with the Director General's operation of the railroads of the Company in substantially the same manner that such Canadian Company operated its railroad and

properties in conjunction and cooperation with the Company during the test period.

(c) Through train service shall be maintained over the railroads of each of the Canadian Companies and the railroad of the Company connecting therewith at the International Boundary Line. The Director General shall, out of the equipment of the Company, furnish the necessary equipment for such through train service in so far as the equipment of the Canadian Companies may not be adequate or available for such service. The Director General shall work and operate said through trains south of the International Boundary Line; and the Canadian Companies shall work and operate said through trains over their respective roads north of the International Boundary Line. Each of the Canadian Companies shall maintain such reasonable local train service as may be required to handle local traffic, or to meet legal requirements, and in so far as its equipment may not be adequate to perform such local service, the Director General shall furnish it equipment therefor out of the equipment of the Company.

(d) The Company shall pay or cause to be paid to the Director General an amount equivalent to the railway operating revenues (including hire of equipment and joint-facility rents) accruing to the Canadian Companies, during Federal control, allocated with respect to the period of Federal control, and the periods prior and subsequent thereto, in the manner as provided in paragraph (b) of section 4 of this agreement.

(e) The Director General shall pay to the Company, or shall pay to or expend for the Canadian Companies (for the account of the Company), for or on account of:

(1) Operating expenses, reparation claims, hire of equipment, and joint-facility rents, the same aggregate amount that he would be required to pay, expend, appropriate, or bear under the provisions of this agreement if the same were applicable to said Canadian Companies and the properties thereof, and said Canadian Companies were within the meaning of the term "Companies" as used herein. Said operating expenses, reparation claims, hire of equipment, and joint-facility rents of said Canadian Companies

shall be allocated as provided in paragraph (b) of section 4 hereof, and shall include all items chargeable thereto under the provisions of this agreement, including those items enumerated in paragraph (e) of section 5 hereof;

(2) Maintenance, repair, renewal, retirement, depreciation, destruction, loss and damage, the same aggregate amount he would be required to pay, expend, appropriate, or bear under the provisions of this agreement if said provisions were applicable to the Canadian Companies and the properties thereof, and said Canadian Companies were within the meaning of the term "Companies" as used herein;

(3) Taxes assessed and levied upon the properties of each of the Canadian Companies, and upon its right or privilege to operate, and/or its revenues derived from operation, and all other taxes which under the accounting rules of the Commission in force December 31, 1917, are properly chargeable to railway tax accruals, the amount thereof assessed and/or levied for the period of Federal control, allocated with respect to the period of Federal control, and the periods prior and subsequent thereto in the same manner as provided for the allocation of taxes assessed and levied against the properties of the Company for the period of Federal control; and

(4) Amounts expended for additions, betterments and road extensions, interest at the rate and upon the bases as provided in paragraph (d) of section 8 hereof.

[fol. 77] (f) The Company as the owner of all the issued and outstanding shares (except directors' and trustees' qualifying shares) of stock of each of the Canadian Companies (except the Midland Railway Company of Manitoba), and as the owner of one-half of all the outstanding stock of the Midland Railway Company (except directors' and trustees' qualifying shares) covenants that subject to the laws of the Dominion of Canada and the Provinces of Manitoba and British Columbia, it will cause the said Canadian Companies, and each of them, to do and perform all acts and things necessary to be done and performed in order to give effect to this section (section 7) of this agreement; that from time to time it will, subject to the laws

aforesaid, and to the extent necessary to make effective the provisions of this agreement, vote or cause to be voted stock owned by it in said Canadian Companies, as the Director General may from time to time in writing direct; and from time to time, and subject to said laws, it will cause the respective boards of directors of said Canadian Companies to elect or appoint as officers and agents, such persons as in writing the Director General may direct. The Company agrees to protect and hold harmless the Director General from all claims and demands of the Northern Pacific Railway Company or any other stockholders of the Midland Railway Company of Manitoba, arising or growing out of or existing because of the ownership of stock in said Midland Railway Company, or any right, title or interest in or incident to said Company or incident to the operation or use of the properties thereof or the revenues derived therefrom.

(g) In order to avoid duplication of work and expense the Director General and the Company agree whenever practicable and reasonable that the officers, agents and employees of the Director General engaged in the operation of the Company's transportation system shall perform like services for the Canadian Companies that they perform for the Director General. The Director General's accounting force shall keep and handle the accounts of the Canadian Companies in so far as they relate to operating revenues, operating expenses, taxes, equipment rentals and joint-facility rentals. For accounting purposes the said Canadian lines shall be considered as accounting divisions of the Company. The operating accounts of the Canadian lines as above described shall be kept in books of account in substantially the same manner as they were kept during the test period. The officers of the Company shall have the right to check said books of account. On the last day of each month a statement shall be prepared and submitted to each of the parties showing (1) the aggregate operating revenues (including hire of equipment and joint-facility rents) of each of the Canadian Companies for the preceding calendar month, and (2) the aggregate operating expenses, taxes, interest, reparation claims, hire of equipment and joint-facility rents of each of the Canadian Companies for the preceding calendar month, which the Director

General, by sub-paragraphs 1, 2, 3 and 4 of paragraph (e) of this section is required to pay to or expend for the Canadian Companies or to pay the Company. Any of said revenues of the preceding month accruing to the Canadian Companies or any of them remaining in the possession of the Canadian Companies or any of them, or of the Company shall be turned over to the Director General, and to the extent that the Director General shall not have already done so the Director General shall pay to the Company or shall pay to said Canadian Companies (for the account of the Company), for and on account of operating expenses, taxes, interest, reparation claims, hire of equipment and joint-facility rents to an amount as obligated by sub-paragraphs 1, 2, 3 and 4 of paragraph (e) of this section. At the request of either party there shall be an accounting of the amounts due by one party or the other under this section at the end of each year of Federal control and at the end of Federal control.

(h) This agreement shall be construed, as nearly as practicable, as securing to the Director General and the Company the same financial benefits, and as imposing upon them the same financial obligations that would accrue or rest upon them, respectively, were the properties of the Canadian Companies now, and during the test period had been, owned and operated by the Company, and covered by the provisions of this agreement.

[fol. 78] Section 8—Compensation

Sec. 8. (a) The annual compensation guaranteed to the Companies under section 1 of the Federal control act shall be the sum twenty-eight million, seven hundred seventy-one thousand, three hundred sixty dollars and seventy-eight cents ($28,771,360.78) during each year and pro rata for each fractional part of a year of Federal control, subject, however, to any increase or decrease in the standard return hereafter made by the Commission as provided in paragraph (d) of the preamble of this agreement.

Compensation paid by the Director General under this agreement, including that provided for in paragraph (d) of this section, or arising from any other source, shall be

paid to the Company; and the Company, after retaining such part thereof as it may be entitled to retain, shall distribute the remainder to the parties entitled thereto.

(b) The said compensation shall be paid to the Company quarterly in equal installments on the last days of March, June, September, and December of each year for the quarter ending therewith, except that the first three installments shall be due as of March 31, 1918, June 30, 1918, and September 30, 1918, respectively, but shall be paid upon the execution of this agreement; but from each installment there may be deducted any amount then due by the Companies under paragraphs (a) and (d) of section 4 hereof, under paragraph (b) of section 5 hereof, and under paragraph (b) of section 6 hereof, and all amounts required to reimburse the United States for the cost of additions and betterments made to the property of the Companies not justly chargeable to the United States, unless such matters are financed or otherwise taken care of by the Companies to the satisfaction of the Director General, and the Director General may apportion any such amounts to two or more subsequent installments: Provided, however, that said power to deduct amounts due or accruing under paragraph (b) of section 5 hereof and the cost of additions and betterments not justly chargeable to the United States shall not be so exercised as to prevent the Companies from paying out the sums reasonably required to support their corporate organizations, to keep up sinking funds for the Companies' debts required by contracts in force December 31, 1917, to pay their taxes, to pay rents and other amounts (not chargeable to capital account) properly payable by the Companies for leased or operated roads and properties, to pay interest which has heretofore been regularly paid by the Companies, and interest on loans issued during Federal control and approved by the Director General, nor shall such deduction be made in respect of additions and betterments which are for war purposes and not for the normal development of the Companies, nor in respect of road extensions, nor in respect of amounts due under paragraphs (a) and (d) of section 4 hereof, in cases where the current assets, including materials and supplies, of the Companies taken over by the Director General under the

provisions of this agreement clearly exceed the current liabilities of the Companies paid or assumed by the Director General under said section. In the event of a difference as to the fact whether additions and betterments are for war purposes and not for the normal development of the Companies, or as to whether an addition is a road extension, the question may, on application of the Director General or the Company, be referred to and determined by the Commission.

The power provided in this paragraph to deduct the amount due by the Companies for the cost of additions and betterments not justly chargeable to the United States is further declared to be an emergency power, to be used by the Director General only when he finds that no other [fol. 79] reasonable means is provided by the Companies to reimburse the United States, and, as contemplated by the President's proclamation and by the Federal control act; it will be the policy of the Director General to so use such power of deduction as not to interrupt unnecessarily the regular payment of dividends as made by the Companies during the test period.

Overdue installments of compensation, or balances thereof, provided for in this section shall bear interest from maturity at the rate of five per cent per annum, except that if the Director General shall, prior to the execution of this contract, have loaned the Companies any money, the installments of compensation overdue at the date of the execution hereof shall bear interest from maturity at the same rate as that charged to the Companies on such loans.

(c) During Federal control the Companies shall not, without the prior approval of the Director General, issue any bonds, notes, equipment trust certificates, stock, or other securities, or enter into any contracts, except contracts in respect of corporate affairs and property not taken under Federal control), or agree to pay interest on their debts at a higher rate, or for rent of leased roads and properties a larger amount, than the rates and amounts payable as of, or required by contracts in force on December 31, 1917. The Companies may, however, procure the authentication and delivery to them under any mortgage or trust deed or agreement in force December 31, 1917, of

bonds or notes issuable thereunder in respect of additions, betterments, extensions, and equipment, or for refunding purposes.

(d) Upon the cost of additions and betterments, less retirements in connection therewith, and upon the cost of road extensions, made to the property of the Companies during Federal control, the Director General shall, from the completion of the work, pay the Company at a reasonable rate of interest, to be fixed by him on each occasion. In fixing such rate or rates he may take into account not merely the value of money but all pertinent facts and circumstances, whether the money used was derived from loans or otherwise, provided that to the extent that the money is advanced by the Director General or is obtained by the Companies from loans or from the proceeds of securities the rate or rates shall be the same as that charged by the Director General for loans to the Companies or to other companies of similar credit.

(e) From the compensation so received or from other income, if adequate for the purpose, the Companies shall make all payments of interest, rents (other than the equipment rents, joint-facility rents, and rents classified as operating expenses mentioned in paragraph (j) of section 4 hereof), and other sums necessary to prevent a default under any mortgage or lease of any of the property described in paragraph (a) of section 2 hereof; and if at any time during Federal control the Companies, by virtue of any change in the right of possession (subject to the rights of the United States) to any of said property or otherwise, shall no longer be entitled as between themselves and any other person or corporation, not a party to this agreement, to receive the entire compensation herein provided, such compensation shall be apportioned and paid as between those entitled thereto, as justice and right may require.

[fol. 80] Section 9—Claims for Losses on Additions, etc.

Sec. 9. (a) Prompt notice in writing, except as provided in paragraph (d) of this section, shall be given the Companies of the making or ordering of any additions, betterments, or road extensions, including terminals, motive power, cars, or other equipment to or for the property of

the Companies costing more than one thousand dollars, with an estimate of the cost thereof. Such notice shall be given before the beginning of the work or the acquisition of the property whenever in the judgment of the Director General it is practicable to do so. Within a reasonable time after the completion of the work or the acquisition of the property, a written statement of the final cost thereof shall be given the Companies. There shall be furnished the Companies, as soon as practicable after the end of each month, a written statement of all expenditures estimated to cost one thousand dollars or less chargeable to investment in road and equipment made during the month, with a brief description of the work done or of the property acquired; and such statement shall constitute all the notice of additions and betterments costing one thousand dollars or less required by (b) and (c) of this section. The notices provided in this paragraph may be given to the president of the Company unless the Company designates some other officer to receive the same, in which event the notice shall be given to such other officer.

(b) Any claim of the Companies for loss accruing to them by reason of expenditures for additions and betterments made to their property during Federal control in connection with or as a part of the work of maintaining, repairing, and renewing the Companies' property and chargeable under the accounting rules of the Commission in force December 31, 1917, to investment in road and equipment, except such expenditures as are incurred in connection with the replacement of buildings and structures in new locations, may be determined by agreement between the Director General and the Companies, or, failing such agreement as to the fact or amount of such loss, the questions at issue may, upon the application of the Director General or the Companies at any time after the filing of the statement of claim hereinafter referred to, be ascertained in the manner provided in section 3 of the Federal control act: Provided, however, that no loss shall be claimed by the Companies and no money shall be due them in respect of such additions and betterments upon the ground that the actual cost thereof at the time of construction was greater than under other market and commercial conditions; and for the purpose of determining such con-

troversy the amount paid for any addition or betterment shall be deemed the fair and reasonable cost thereof and shall be taken as the basis for such determination; nor unless the Companies, within sixty days of notice to them that the work will be done, shall give the Director General notice of objection thereto and shall file with the Director General a statement of claim within ninety days after notice of the completion of the work.

(c) Any claim of the Companies for loss accruing to them by reason of any additions and betterments which are not made in connection with or as a part of the work of maintaining, repairing, and renewing the Companies' property, or accruing to them in connection with maintenance in the replacement of buildings and structures in new locations, or by reason of road extensions, terminals, motive power, cars, or other equipment made to or provided for the property of the Companies during Federal control, may be determined by agreement between the Director General and the Companies, or failing such agreement as to the fact or amount of such loss, may, by proceedings instituted not later than six months after the end of Federal control, be ascertained in the manner provided in section 3 of the Federal control act: Provided, however, that no loss shall be [fol. 81] claimed by the Companies and no money shall be due to them in respect of such additions, betterments, road extensions, terminals, motive power, cars, or other equipment mentioned in this paragraph upon the ground that the actual cost thereof at the time of construction or acquisition was greater than under other market and commercial conditions; and for the purpose of determining such controversy the amount paid for any additions, betterments, road extensions, terminals, motive power, cars, or other equipment shall be deemed the fair and reasonable cost thereof and shall be taken as the basis for such determination; nor unless within sixty days after notice to the Company of such construction or acquisition written notice is given to the Director General by the Company that a loss will be claimed in respect thereof. With and as a part of such notice the Company shall state the objections to such construction or acquisition as far as reasonably practicable at the time. Nothing in this agreement shall be construed as barring the United States from contending that no loss

within the meaning of the Federal control act accrued to the Companies by reason of any additions, betterments, or road extensions made during Federal control by order or approval of the Director General, if it is made to appear that the Companies themselves but for Federal control should in the exercise of sound judgment have made such addition, betterment, or road extension.

(d) Where additions, betterments, or road extensions or terminals, motive power, cars or other equipment have been made to or provided for the property of the Companies during Federal control but prior to the execution of this agreement, the Director General shall not be required to give the notice thereof provided for in paragraph (a) of this section, and notice by the Company of any claim of loss in respect thereto may be given the Director General within ninety days after the execution hereof; and such claims shall thereafter be proceeded with in the manner provided in paragraph (b) or paragraph (c) of this section, as the case may be.

(e) The Director General shall reimburse the Companies for the amount of loss ascertained under this section with a proper adjustment of interest thereon.

(f) The Director General shall not acquire any motive power, cars, or other equipment at the expense, or on the credit, of the Companies in excess of what in his judgment is necessary, in addition to their then existing equipment, to provide for the traffic requirements of their own systems of transportation; but this provision shall not prevent the Director General, after the acquisition of such equipment, from using the same, or any part thereof, on the line of any other transportation system operated by him.

[fol. 82] Section 10—Final Accounting

Sec. 10. (a) At the end of Federal control all the property described in paragraph (a) of section 2 hereof shall be returned to the Companies, together with all repairs, renewals, additions, betterments, replacements, and road extensions thereto which have been made during Federal control, except as any part thereof may have been destroyed or retired and not replaced, in which case the provisions of section 5 hereof shall govern and except that the Direc-

tor General shall not be obliged to restore or replace property destroyed or damaged by the acts of public enemies.

(b) At the end of Federal control the Director General shall return to the Companies all uncollected accounts received by him from them and also materials and supplies equal in quantity, quality, and relative usefulness to that of the materials and supplies which he received, and to the extent that the Director General does not return such materials and supplies he shall account for the same at prices prevailing at the end of Federal control. To the extent that the Companies receive materials and supplies in excess of those delivered by them to the Director General they shall account for the same at the prices prevailing at the end of Federal control and the balance shall be adjusted in cash.

(c) The total amount of the account "Net balance receivable from agents and conductors" at the end of Federal control may be turned over by the Director General to the Company. He may also turn over all assets which have accrued out of operation; and the Company shall, to the extent of the cash received or realized from such assets, pay and charge to the Director General all expenses arising out of railway operations during Federal control, including reparation and other claims, and may, unless objection is made by the Director General, pay and charge to him any such expenses, including reparation and other claims, in excess of the cash so received or realized. On the first day of the third month following the termination of Federal control an accounting between the parties shall be had, and so on the first of each third month thereafter. Any balance found due either party shall be payable as of the date on which the account is stated and shall bear interest until paid.

(d) At the end of Federal control there shall be paid to the Companies any balance then remaining unpaid of the cash received from them at the beginning of or during Federal control, together with any unpaid interest which may have accrued upon the same. There shall also be paid to the Companies any funds created under the provisions of this agreement except to the extent that such funds may have been properly used under this agreement.

(e) Wherever under any provision of this section there is to be an adjustment of interest, it shall be at the rate of five per cent per annum, unless the parties shall in any case agree on a different rate.

(f) After Federal control no claim by or against the Director General shall be settled by the Companies against the written objection of the Director General or the Attorney General of the United States. The conduct of all litigation before any court or commission arising out of such disputed claims or out of operations during Federal control shall be in charge of the Companies' legal force and the expense thereof shall be paid by the Companies; but the Director General or the Attorney General may, at the expense of the United States, employ special counsel in connection with any such litigation.

[fol. 83] Execution

In witness whereof, these presents have, on the 30th day of December, 1918, been duly signed, sealed and delivered by William G. McAdoo, Director General of Railroads, and have, on the 16th day of December, 1918, been duly signed, sealed and delivered by the Great Northern Railway Company, Duluth Terminal Railway Company, Minneapolis Western Railway Company, Minneapolis Belt Line Company, Great Northern Terminal Railway Company, Great Northern Equipment Company, The Duluth & Superior Bridge Company, Watertown & Sioux Falls Railway Company, Montana Eastern Railway Company, and the Great Falls & Teton County Railway Company, by their respective Presidents or Vice-Presidents, and duly attested by their respective Secretaries or Assistant Secretaries, and their respective corporate seals hereto affixed; such execution and delivery on the part of said Companies having been duly authorized and/or ratified by votes of their respective stockholders and Boards of Directors at meetings duly called and held on the 16th day of December, 1918.

W. G. McAdoo, J. S. P., Director General of Railroads. (Seal.) In presence of: —— ——, Great Northern Railway Company, by Erasmus C. Lind-

ley, Vice President. Attest: F. L. Paetzold, Secretary. (Seal.) In presence of: —— ——. Duluth Terminal Railway Company, by Ralph Budd, President. Attest: F. L. Paetzold, Secretary. (Seal.) In presence of: —— ——. Minneapolis [fol. 84] Western Railway Company, by Ralph Budd, President. Attest: F. L. Paetzold, Secretary. (Seal.) In presence of: —— ——. Minneapolis Belt Line Company, by Erasmus C. Lindley, Vice President. Attest: F. L. Paetzold, Secretary. (Seal.) In presence of: —— ——. Great Northern Terminal Railway Company, by Erasmus C. Lindley, Vice President. Attest: F. L. Paetzold, Secretary. (Seal.) In presence of: —— ——. Great Northern Equipment Company, by Erasmus C. Lindley, Vice President. Attest: F. L. Paetzold, Secretary. (Seal.) In presence of: —— ——. The Duluth & Superior Bridge Com- [fol. 85] pany, by Ralph Budd, President. Attest: F. L. Paetzold, Secretary. (Seal.) In presence of: —— ——. Watertown & Sioux Falls Railway Company, by Ralph Budd, Vice President. Attest: F. L. Paetzold, Secretary. (Seal.) In presence of: —— ——. Montana Eastern Railway Company, by Ralph Budd, President. Attest: F. L. Peatzold, Secretary. (Seal.) In presence of: —— ——. Great Falls & Teton County Railway Company, by Ralph Budd, President. Attest: F. L. Paetzold, Asst. Secretary. (Seal.) In presence of: —— ——.

Pursuant to due authority, I as Custodian of the records of the United States Railroad Administration do hereby certify that the foregoing is a true copy of Agreement between the Director General of Railroads and the Great Northern Railway Company and Other Corporations dated December 30th, 1918, now a part of the files and records of the Railroad Administration in my possession.

Witness my hand and the seal of the United States Railroad Administration this 4th day of December, 1926.

A. W. Stoll, Chief Clerk for A. W. Mellon, Director General of Railroads. (Seal.)

[fol. 86] [File endorsement omitted.]

[fol. 87] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES—Filed January 13, 1927

First Defense

United States for the First Defense to the petition filed herein against it says:

The District Court is without jurisdiction to entertain the petition. The certificate and amended certificate of the Interstate Commerce Commission, Exhibits B and C, dated, respectively, June 17, 1925 and June 8, 1926, do not constitute orders within the meaning of the Commerce Court Act of June 18, 1910 (c. 309, 36 Stat. 539) and Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219, 221).

Wherefore defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Second Defense

United States for the Second Defense to the petition filed herein against it says:

The District Court is without jurisdiction to entertain the petition. The prayer of the petition "that a decree be entered herein setting aside, annulling and suspending said certificate and order of June 8, 1926 * * * 'Exhibit C' * * *; that defendant be restrained and enjoined from disposing of any of said Liberty bonds, and from withholding from petitioner the said Liberty bonds and the interest coupons thereon, and any thereof; and that defendant be restrained and enjoined from withholding any payments due from the United States to petitioner and from asserting [fol. 88] the said certificate of the Commission as an offset against any such indebtedness, and that the use of said order or certificate for any purpose whatever by the United States, or any official thereof, be perpetually enjoined," * * * is in substance a prayer for a mandatory injunction against the United States without designating or indicating any officer or officers of the United States or any person or persons acting or refusing to act for and on behalf of

the United States against whom such an injunction may be issued.

Wherefore defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Third Defense

United States for the Third Defense to the petition filed herein against it says:

The District Court is without jurisdiction to entertain the petition. The subject-matter of the petition relates to an accounting and settlement between the petitioner and the United States which is not and cannot be made the subject of the equitable jurisdiction of the specially-constituted District Court under the Commerce Court Act of June 18, 1910 (c. 309, 36 Stat. 539) and Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219, 221) in a suit to enjoin, set aside, annul or suspend in whole or in part an order of the Interstate Commerce Commission.

Wherefore, defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Fourth Defense

United States for the Fourth Defense to the petition filed herein against it says:

The District Court is without jurisdiction to entertain the petition. The Commerce Court Act of June 18, 1910 (c. 309, 36 Stat. 539, 540) provides: "The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive." If the certificate and amended certificate of the Interstate Commerce Commission, Exhibits B and C, dated, respectively, June 17, 1925 and June 8, 1926, [fol. 89] are held to be orders within the meaning of the Commerce Court Act of June 18, 1910 (c. 309, 36 Stat. 539) and Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219), and as under those acts the jurisdiction of the District Court is exclusive, the right of the United States to enforce its demand against the petitioner in such manner as it may deem appropriate and as authorized by law is taken away.

Wherefore defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Fifth Defense

United States for the Fifth Defense to the petition filed herein against it says:

The District Court is without jurisdiction to entertain the petition. If it be held that the certificate and amended certificate of the Interstate Commerce Commission, Exhibits B and C, dated, respectively, June 17, 1925 and June 8, 1926, constitute orders of the Commission they have only the force and effect of orders for the payment of money and the petitioner has an adequate remedy at law.

Wherefore, defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Sixth Defense

United States for the Sixth Defense to the petition filed herein against it says:

The petition with the exhibits attached thereto and made a part thereof is without equity on its face and does not state any cause of action against the United States.

Wherefore defendant moves to dismiss the petition and prays that an appropriate order may be entered.

[fol. 90] Seventh Defense

United States for the Seventh Defense to the petition filed herein against it says:

Petitioner has not shown an irreparable or other injury which entitles it to the relief prayed or any part of the same.

Wherefore defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Eighth Defense

United States for the Eight- Defense to the petition field herein against it says:

I, II, III, IV, V, VI. On information and belief this defendant admits the facts alleged in paragraphs I, II, III, IV, V and VI in manner and form as alleged, with this exception: defendant denies that the petition was brought to enjoin, set aside, annul and suspend two orders of the Commission as alleged in the paragraph introductory to paragraph I.

VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII. Defendant says that the matters and things alleged in paragraphs VII to XVIII, inclusive, are argumentative, vague, indefinite, uncertain and insufficient and defendant denies the same and each and every part of the same in manner and form as alleged, with these exceptions: defendant admits (a) the Commission made and issued the certificate dated March 1, 1921 and, subject to verification, Exhibit A to the petition is a true copy; (b) the Commission made and issued the certificate dated June 17, 1925 and, subject to verification, Exhibit B to the petition is a true copy; (c) the Commission made and issued the amended certificate dated June 8, 1926 and, subject to verification, Exhibit C to the petition is a true copy; (d) the petitioner and the defendant entered into the agreement dated September 20, 1926, and, subject to verification, Exhibit D to the petition is a true copy; (e) the proceeding and order entitled "In the Matter of Settlements with Carriers under the Provisions of Section 209 of the Transportation Act of [fol. 91] 1920" dated October 18, 1920, as alleged in paragraph VIII; (f) the proceeding and order entitled "Finance Docket No. 1606, In the Matter of Final Settlement under Section 209 of the Transportation Act" dated December 15, 1921, as reported in 70 Interstate Commerce Commission Reports, page 711, et seq., as alleged in paragraph X; (g) the proceeding and order entitled "Finance Docket 501, Guaranty Settlement with Great Northern Railway Company and Affiliated Companies," dated June 17, 1925, as reported in 99 Interstate Commerce Commission Reports, page 231, et seq., as alleged in paragraph XI; and the proceeding and order entitled "Finance Docket No. 501, Guaranty Settlement with Great Northern Railway Company and Affiliated Companies," dated June 8, 1926, as reported in 111 Interstate Commerce Commission Reports, page 318, et seq., referred to in paragraph XI.

Specifically this defendant denies the following allegation and each and every part of the same in Paragraph XII: "Petitioner had not on June 17, 1925, nor on June 8, 1926, and has not now in fact been overpaid in any amount whatever under the terms of said Section 209, or otherwise, and the payments heretofore made to it are not in fact in excess of the amounts necessary to discharge the obligations of the United States to petitioner under Section 209, but on the contrary the Commission's certificate of March 1, 1921, as well as its certificates of June 17, 1925, and June 8, 1926, each greatly understated the amounts due to petitioner."

Further answering defendant alleges that in the proceeding styled "Finance Docket No. 501, Guaranty Settlement with Great Northern Railway Company and Affiliated Companies," dated June 8, 1926, and reported in 111 Interstate Commerce Commission Reports, page 318, et seq., the matters and things set forth in the petition and sought to be put in issue before the Court were all before the Commission, were fully heard and determined by it, and were within its power and authority to hear and determine under the provisions of the Interstate Commerce Act. In its report in writing with respect thereto, a copy of which is attached hereto as Exhibit 1 and made a part hereof, made after full hearing and on due notice to all of the parties, which states its conclusion together with its de-[fol. 92] cision or requirement in the premises, the matter and things of which complaint is made were fully considered and foreclosed by findings of fact based on substantial evidence.

Defendant alleges that the facts set forth in the foregoing report of the Commission and each and all of the same are true and correct.

Defendant specifically denies—

(a) Any fact or facts alleged in the petition, or any part of the same, which deny, or which seek to deny, any fact or facts found by the Commission.

(b) Any fact or facts alleged in the petition, or any part of the same, which are inconsistent with any fact or facts found by the Commission.

(c) Any and all inferences of fact from any particular fact or facts alleged in the petition, or any part of the same, which seek to deny, or which are inconsistent with any fact or facts found by the Commission.

(d) Any fact or facts alleged in the petition, or any part of the same, which set up, or which seek to set up, matters and things which were not before the Commission.

(e) Any fact or facts alleged in the petition, or any part of the same, which attack or which seek to attack the action of the Commission, and to show facts other than what the Commission has found and declared.

(f) Any allegations in the petition, or any part of the same which allege that facts were found by the Commission in its report which, as shown on the face thereof, were not so found.

(g) Any conclusions of law alleged and insisted upon in the petition, or any part of the same, which are inconsistent with any conclusions of law held by the Commission.

(h) Each and every allegation in the petition contained not herein specifically admitted or denied.

Wherefore, having fully answered, defendant prays that the petition be dismissed at the cost of the petitioner and for such other and further order as may be appropriate.

Blackburn Esterline, Assistant to the Solicitor General. La Fayette French, Jr., United States Attorney.

[fol. 93] *Duly sworn to by Blackburn Esterline. Jurat omitted in printing.*

[fol. 94] EXHIBIT 1 TO ANSWER OF UNITED STATES

F-2358

INTERSTATE COMMERCE COMMISSION

Finance Docket, No. 501

Guaranty Settlement with GREAT NORTHERN RAILWAY COMPANY and Affiliated Companies

[fol. 95] Finance Docket, No. 501[1]

Guaranty Settlement with GREAT NORTHERN RAILWAY COMPANY and Affiliated Companies

Submitted January 16, 1926. Decided June 8, 1926

Upon argument and further consideration, amount necessary to make good the guaranty of section 209 of the transportation act, 1920, to the Great Northern Railway Company, the Farmers' Grain & Shipping Company, and the Watertown & Sioux Falls Railway Company, ascertain to be $11,277,331.79. An aggregate amount of $6,500,000 having been certified for payment as advances under subdivision (h), and an amount of $6,000,000 having been certified as a partial payment under subdivision (g) of said section, as amended by section 212, the amount due the United States in final settlement is $1,222,668.21. Certificate issued under date of June 17, 1925, amended. Original report, 99 I. C. C. 231.

M. L. Countryman, Walker D. Hines, and F. G. Dorety for the carriers.

Report of the Commission on Argument and Further Consideration

By the COMMISSION:

In the original report in this proceeding, by division 4, 99 I. C. C. 231, the amount due the carriers under section 209

[1] This report also embraces Finance Docket No. 463, Guaranty Settlement with Farmers' Grain & Shipping Company, and Finance Docket No. 879, Guaranty Settlement with Watertown & Sioux Falls Railway Company.

of the transportation act, 1920, was found to be $11,178,887.31, and the amount overpaid $1,321,112.69. A certificate was issued to that effect. The carriers thereafter filed petition for reopening and argument before the commission. Pursuant to the petition, the proceeding was reopened for argument, which was heard on January 7, 1926. By permission, a memorandum supplemental to the oral argument was also filed and has been considered. The Great Northern Railway Company and its subsidiaries, the Watertown & Sioux Falls Railway Company and the Farmers' Grain & Shipping Company, will be collectively referred to as the carrier.

The carrier's principal contentions concern our action in fixing an amount to be included in operating expenses for maintenance of way and structures and of equipment in the guaranty period. In order to obtain a fair view of the car- [fol. 96] rier's contentions in this regard, in their relation to the administration of the section as a whole, a general statement is necessary.

Subdivision (g) of section 209 made it mandatory upon us "as soon as practicable after the expiration of the guaranty period," to "ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier." It is obvious that the amounts necessary to make good the guaranty to the several carriers could not be determined until after the close of the guaranty period and the closing of the books of accounts of the carriers with respect to the charges attributable to that period, and until we had determined the principles which should govern in final settlement.

Subdivision (h) of section 209 gave us discretion to certify advance payments during the guaranty period or thereafter upon applications filed by the carriers during that period and provided, among other things, for the execution of contracts in which the carriers agreed to refund any sums advanced in excess of the amount finally found due under the guaranty. Immediately after the passage of the act, many of the carriers applied for such advance payments, and they were certified from time to time during the guaranty period to an aggregate amount of about $254,000,000, including $6,500,000 to the Great

Northern Railway Company. These advance payments were based upon sworn statements submitted by the carriers and upon other available data, such as annual and monthly reports on file with us.

The necessities of the carriers continued after the termination of the guaranty period, but the law apparently did not permit payments under subdivision (h) unless applications therefor had been filed during the guaranty period. In the case of some carriers, no such applications had been filed. In many cases in which advances had been made it appeared, from such estimates as were practicable at that time, that the amounts necessary to make good the guaranty would permit of additional payments. In view of the necessities of the carriers and the urgency of their requests for further payments, we recommended to Congress such legislation as would meet the situation, and in response thereto Congress enacted section 212 of the transportation act, 1920, effective February 26, 1921, which provided for partial payments. Under this authority we certified additional payments to numerous carriers, aggregating about $169,000,000 in which is included a certificate for $6,000,000 in favor of the Great Northern Railway Company, issued on March 1, 1921, three days after section 212 became law.

When these certificates for partial payments were issued, there were certain questions with respect to the interpreta- [fol. 97] tion of section 209 which he had not finally determined, nor were the books of accounts of the carriers closed with respect to the charges attributable to the guaranty period. Hence final ascertainments of the amounts due under the guaranty could not be made. While the certificates issued for partial payments were definite in form, they were necessarily based upon the facts as then known. For us to have to declined to issue such certificates until the facts were definitely and finally ascertained would have defeated the purpose of the law. These certificates rested principally upon the sworn responses of the carriers to our order of October 18, 1920, which called for statistical data relating to revenues, operating expenses, ton-miles, car-miles, etc., designed to aid in a comparison between the test-period and guaranty-period operations and costs. The intent in these certificates was to leave an ample margin still due and uncertified to protect the interest of the Gov-

ernment, and in the great majority of cases the margin so left proved sufficient for the purpose. Usually, at this time, the carriers computed the data called for by our order of October 18, 1920, in accordance with a formula prepared by the Association of Railway Executives, which represented the theory of the carriers for making proper allowance in the maintenance accounts for increased prices and for changes in amount and use of property. Thus, substantially under this formula, the carrier, under a return filed February 9, 1921, claimed $18,498,391.67 as the amount necessary to make good its guaranty. We had previously certified to advances aggregating $6,500,000, and on March 1, 1921, certified a partial payment of an additional $6,000,000, a total of $12,500,000, leaving an apparent margin of about $6,500,000. On March 26, 1921, the carrier submitted a revision of its return computed entirely in accordance with the railway executives' formula, showing $18,645,653.32 as the amount necessary to make good its guaranty. Later the carrier filed a return, designated as final, in which it claimed $17,599,756.42 as the amount due. But by brief of July 2, 1925, it stated that $15,705,688 was approximately correct and that the amount found due should be "at least $15,000,000," although it prayed in the same brief that we issue a certificate "declaring that no refund is due from the carrier and that there still remains due to the carrier under the guaranty such additional amounts as the Commission may determine," thus indicating a minimum claim of $12,500,000, the amount already paid, plus as much more as might be considered reasonable and just.

At the time of the certificate of March 1, 1921, our interpretation of the law and the method of procedure under [fol. 98] it were under consideration. Final conclusions were later reached, after long and careful deliberation and with the aid of arguments and conferences in which the carriers had full opportunity to present their views, and were announced in two reports, namely, Maintenance Expenses under Section 209, issued July 12, 1921, 70 I. C. C. 115, and Final Settlement under Section 209, issued December 15, 1921, 70 I. C. C. 711.

Ascertainments under the principles announced in these reports resulted in materially smaller allowances for maintenance in the guaranty period than had been claimed by the

carriers under the formula of the railway executives. Our conclusions differed from that formula chiefly in the use of a general equation factor instead of separate factors for each group of maintenance expenditures, in the disallowance of claims based on so-called inefficiency of labor, the use of purchase instead of charge-out prices, the use of separate factors for new and scrap materials, and in the treatment of adjustments for differences in amount and use of property. From time of announcement, our treatment of differences in amount and use of property has been very generally accepted by the carriers, but the largest claims of this carrier arise out of another method by which it would have us compute these adjustments. Protests against our treatment of labor, prices, and scrap, which, if conceded, would have precluded the use of a general equation factor, after hearing and argument were found in Treatment of Salvage, Piecework, and Prices, 82 I. C. C. 678, to have insufficient merit to warrant any change in our adopted procedure. The recognition of other claims of the carrier would require us to reverse our finding in the last-cited report, and, in consequence, to reverse our findings in 70 I. C. C. 711, and 70 I. C. C. 115.

The making of the certifications for partial payments before field check could be made of the sworn data submitted by the carriers, and prior to the final determination of the principles governing the guaranty payments, led to overpayments to 35 carriers. Of these, 28 have reached final settlement, 22 have refunded the overpayment or promised to do so, and 6, including the carrier, have neither repaid nor promised to repay.

The carrier alleges various errors of fact and of law, which may be stated in substance as follows:

I. It is alleged that, in arriving at the equation factor representing the increase in prices of labor and materials in the guaranty period as compared with the test period, we failed to give sufficient consideration to the particular circumstances surrounding the carrier's operations.

[fol. 99] Among the special circumstances alleged to support a greater factor than determined by us are—

(a) Geographical location and consequent effect of climatic conditions.

(b) Exceptional condition in regard to the portion of the maintenance work done in the six months of the guaranty period as compared with the remaining part of the year.

(c) Exceptional distribution between maintenance of way and structures and maintenance of equipment charges.

(d) Exceptional distribution between, and in, the several groups of materials as such and labor as such.

(e) Exceptional prices paid for materials and labor, differing from those paid by other carriers.

(f) Exceptional condition in regard to brass as affecting the factor.

In urging these exceptional conditions the carrier insists that its own operations and prices must be controlling, and under a rigid rule or formula endeavors to support a factor of 2.57 to replace our factor of 2.45. In this connection it lays stress upon comparisons it has made between its claimed factor and the factors used by us in settlement with other carriers in its territory.

II. The carrier alleges that we failed to give proper consideration to the increase in amount of property used by it in transportation service in the guaranty period as compared with the test period, particularly in the increase in joint-facility property, and in this connection urges that for additions and betterments the prices used should be as of the dates of the contracts instead of the dates the expenditures were audited.

III. The carrier alleges that we failed to make sufficient allowance for increase in amount and use of equipment and motive power in the guaranty period as compared with the test period. In this connection it claims that we failed to base the allowance upon the actual conditions existing on its lines, particularly as to the use of owned cars and foreign cars, and that in considering the use of owned cars on other lines we used the average car mileage of the country at large instead of the average car mileage in the territory of the carrier and its immediate connections.

In general, the carrier insists that the amount to be included for maintenance must be determined by its own performance, including its own prices, in the test and guaranty

periods, by its own distribution of charges as between materials as such and labor as such, and by its own allocation of these charges to the various accounts; that in computing the effect of the changed condition, separate factors must be determined for each individual item and account, with specific allowances for crossties, rails, freight-car materials, locomotive materials, section labor, bridge labor, labor of mechanics, etc., and that the result so obtained must be combined into an equation factor under a rigid rule or [fol. 100] formula of its own selection. We said in Maintenance Expenses under Section 209, supra, at page 122:

It appears that after setting forth in general terms the obligation of the director general with regard to upkeep, it became necessary to fix some practicable method by which his compliance with this covenant might be measured. The proviso [paragraph (a) of section 5 of the "standard contract"] was the method definitely agreed upon by the parties. In essence it provides that the annual expenditure, or payment into funds, of sums for maintenance during Federal control equal in the aggregate, after equation in accordance with paragraph (c), to the corresponding sums spent or reserved during the test period "shall be taken as a full compliance with the foregoing covenant."

We went on to say:

We are clear that it was the purpose of this proviso to provide a simple and easily applied test which would make it possible to measure compliance with the covenant by resort to the accounts of the carriers and without the prolonged controversy which would follow any method involving physical inspection or opinion evidence. In other words it was the purpose to employ what has been called an "accounting" test rather than an "engineering inspection" test.

What we have done is to determine from all the evidence before us an equation factor, in accordance with the provisions of paragraph (c) of section 5 of the "standard contract," which, when applied to the amount spent for maintenance proper during the test period, would produce during the guaranty period, under honest, economical, and efficient management, the equivalent of that test-period expenditure. We have not determined a specific allowance

for crossties, rails, section labor, etc., and the result obtained by multiplying the test-period charges in any specific account by our general equation factor has no significance. That factor is a composite factor applicable only to the maintenance expenditures proper of the test period in their entirety.

We further said in the same report as follows:

For the most part these claims [of the carriers] have been based on a formula devised by a committee of accounting officers and engineers representing the Association of Railway Executives. More recently another formula has been devised after conferences between representatives of the carriers and representatives of our bureau of finance. But both these formulæ are based upon the theory that changes in the ratio of maintenance expenditures for labor and for materials, so far as they are not accounted for by differences in prices and wages, necessarily reflect changes in the quality or effectiveness of labor. This theory presupposes a degree of similarity, in two given periods, between the kind of work and the conditions under which it is performed which no formula can establish and which the very nature of maintenance makes improbable, particularly when the comparison is between an average six months of a three-year period and the six guaranty months of the year 1920. The incongruous results which such a formula will produce may easily be shown.

[fol. 101] After five months of further deliberation, aided by computations under other formulæ, we reached this conclusion, in Final Settlement under Section 209, supra:

We are of the opinion that the allowances for differences that may exist between the cost of labor and material for the test period and for the guaranty period, respectively, can not practicably be made upon the basis of any rigid rule or formula, but these allowances must be fixed by us in the exercise of a reasonable judgment upon consideration of all the relevant facts and circumstances.

We further found, in Final Settlement under Section 209, supra, in reference to the manner of computing the guaranty allowance for maintenance, as follows:

There shall first be deducted from the maintenance expenses of the test period all amounts included therein for (a) depreciation, (b) retirements, and (c) insurance.

The remainder, after being adjusted for differences in amount and use of property maintained, shall be multiplied by a factor representing the increase in the general level of cost of labor and material for the territories in which the lines of railway of the carrier are situated. To the product thus arrived at shall be added back the deductions hereinabove provided for, adjusted for differences in amount and/or use of property maintained. The resulting sum will be the amount to be fixed by us as that which shall not be exceeded in charges to operating expenses for the purposes of the guaranty for the aggregate of maintenance of way and structures and maintenance of equipment. The methods of adjustment for differences in amount and use of property are indicated separately for maintenance of way and structures and for maintenance of equipment in the forms hereto annexed.

In Treatment of Salvage, Piecework, and Prices, supra, this matter was further elucidated, on page 679, as follows:

In the same report [Final Settlement under Section 209, 70 I. C. C. 711, 715] we announced that carriers would be required, in submitting their claims or statements, to report the increase in cost of labor and material for their respective territories, but were informed that the prices actually paid by them might not represent the increase in cost for which the law required "due allowance" to be made. In explaining this qualification we said, "What we construe the proviso to mean and what we find to be practicable in a settlement of these matters contemplate a determination of changes in the general levels of cost of labor and material beyond the carrier's control." In administering this principle, we have given consideration to and have made allowance for special conditions affecting individual carriers which were not applicable to other carriers operating in the same general territory. We further announced our conclusion that such determination could not practicably be made upon the basis of any rigid rule or formula, but that the allowance must be fixed in the exercise of a reasonable judgment upon consideration of all the relevant facts and circumstances.

From our investigation and studies we arrived at the conclusions that while there might be unusual conditions affecting the carriers in a particular region, which conditions were beyond their control, nevertheless the effect of [fol. 102] such conditions, being general, would be reflected in the territorial factor, and at the same time we recognized that conditions affecting an individual carrier in such region might not only be unusual and beyond its control, but might be different from those affecting the carriers generally in that territory and that such conditions should be reflected and given weight in the equation factor used in the settlement with the individual carrier.

I

The line of the Great Northern is the most northerly in the United States. For this reason the carrier claims that it is adversely affected by weather conditions to a much greater extent than any other carrier in its territory. The monthly charts of the United States Weather Bureau for the periods involved show a maximum difference in temperature on the line of the Great Northern as compared with that on the lines of other carriers in its territory of only 5°. The average difference in temperature in all probability did not exceed 2°. We are not persuaded that the geographical location of the carrier caused its maintenance conditions to be materially different from those of the other lines in its territory.

It may be admitted, as the carrier claims, that it expended relatively more for maintenance during the guaranty-period months than during the remainder of the year, but the other carriers in its territory did the same, so that this can not be a condition affecting the carrier and not the other carriers in its territory. The carrier advances this circumstance in connection with its contention for an increased equation factor. Whether the carrier spent more or less for maintenance during the months of the guaranty period than during the remainder of the year would have no effect upon the equation factor representing the general increase in prices of materials and wages of labor. In any event, such a claim could not be considered, because the law definitely fixes as a base the average six months of the three-year test period.

The carrier contends that in determining its maintenance allowance an equation factor should be used that is greater than the average for the territory in which it operates, because of the exceptional distribution of its charges during the test period between maintenance of way and structures and maintenance of equipment, and also because of exceptional distribution between expenditures for labor and expenditures for material. The increase of prices in the guaranty period as compared with the test period was not so great for certain materials as for others, nor was it so great in the case of most prices as in the case of wages, and there were like differences as between the wages of various groups of employees. It therefore follows that different [fol. 103] distributions of the same total expenditure in the test period, as between material and labor and as between various forms of maintenance work, will produce different composite equation factors.

The distribution of the maintenance expenditures of the carrier during the test period has been given consideration and has been one of the circumstances leading us to allow the carrier an equation factor somewhat higher than the general territorial level. But the effect of such distribution can not properly be measured by rigid formula, as proposed by the carrier, for a number of reasons. There is no provision in our accounting rules for an accurate distinction between labor as such and material as such. What may be appear as differences between the proportion of labor and material to the total expenditures as between carriers, may in reality be mere differences in nomenclature, that which is called labor by one carrier being termed material by another. The practices of the carriers in this regard vary. Moreover, the analysis of distribution as between different kinds of maintenance and as between labor and material is so complicated and difficult a task that in practice not all items are analyzed. Certain items of material are selected by the carrier as representative of prices of different classes; from these, ratios of increase or decrease are computed. The remaining similar items, or items considered to be in the same class, are assumed to change in the same proportion. The results of such analysis are only approximate. The distribution also varies from year to year, and any rule which attempted to base

equation factors on the exact distribution during the test period would lead to uneven and unjust results for the guaranty period.

It is clear that the entire purpose of the proviso of the standard contract was to adjust expenditures in the aggregate. The plain terms of the proviso so stated. The determinations of increase in general levels of cost must be determinations in the aggregate. The method of this determination was given thorough consideration in the cases which have been cited. The principles there enunciated have been followed in the many settlements with carriers which have since been effected, and the same principles are being followed here. No good reason has been advanced for the adoption at this late date of different principles.

In regard to the contention of the carrier that it paid exceptional prices for materials and for labor differing from the prices paid by other carriers in its territory, it appears that the carrier's test period prices and rates of pay were in some instances lower than those of other carriers. However, a lower test-period price reported by one carrier than [fol. 104] by others for apparently the same article may be due in whole or in part to differences in quality or grade. Moreover, although, as stated, some of the carrier's test-period prices for materials and wages of labor were lower than the average in its territory, others were higher, the same being true of the guaranty period. In the aggregate, the change in the general level differed only slightly from the average of the territory as a whole. It is also evident that in some instances the high guaranty-period rates claimed by the carrier for labor were produced, among other things, by the inclusion of large amounts of overtime pay at penalty rates.

In regard to the carrier's claim, based on a special analysis of brass and journal bearings, for an increase in the equation factor for equipment material, this claim could not be given consideration without abandoning the use of a general equation factor and adopting the impracticable principle of separate equation factors for each item and group of accounts. In view of our former holding in Maintenance Expenses under Section 209, Final Settlement under Section 209, and Treatment of Salvage, Piecework, and Prices, supra, it would seem unnecessary to discuss this

contention. However, if we could accept the principle of separate equation factors and if it were practicable to develop such factors, we could not accept the results here claimed by the carrier for the reason that for the test period the carrier has used assumed prices for new and for scrap brass which were materially below the market price, while for the guaranty period it has used the market price of this brass thus producing a disproportionate increase which in no way indicates the change in the general level of prices but rather gives the relation between a low test-period price arbitrarily fixed by the carrier, without regard to prevailing prices, and the normal guaranty-period price. Incidentally, in pricing rail the carrier reversed the above process, in that it used an arbitrary price for used rail, unsupported by prevailing prices, in the guaranty period.

The carrier argues the injustice of the use of a territorial factor and insists that it has been denied an opportunity to see the anlysis of the facts upon which our factor is based. Our territorial or regional factor represents our judgment of the composite increase in the general level of the prices of materials and wages of labor in the carrier's territory. It has not been and can not be divided into separate factors for each of the items which go to make up the aggregate expenditures, but rests upon all of our studies in connection with this subject, after review of data from various carriers and all other sources, and after consideration of all other relevant facts and circumstances ascertainable. The burden is upon the carrier to show that there existed on its [fol. 105] lines unusual conditions beyond its control and differing from those on the lines of other carriers in its territory, in order that it may be taken out of the general class and assigned a higher or a lower factor. After giving weight to the special conditions on the line of the carrier for which due allowance should be made, we have used in our final ascertainment a factor five points higher than the territorial factor.

As stated above, the carrier has endeavored to support its claim for a higher factor than that used by us by a comparison of its performance with that of the Chicago, Milwaukee & St. Paul, the Northern Pacific, the Chicago, Burlington & Quincy, the Chicago & North Western, and the Minneapolis, St. Paul & Sault Ste. Marie. The comparisons presented lack force for the following reasons:

(a) Each of these comparisons is based on the so-called director general's or Laspeyres' formula, which we ruled against in Maintenance Expenses under Section 209, and again in Final Settlement under Section 209, supra.

(b) The factors the carrier uses for other carriers in its comparisons are not shown to be the result of applying this same formula. As a matter of fact, the factors used are those applied by us in final settlement with these other carriers, and as they are judgment factors, arrived at independently of any rule or formula, they can not be broken down into integral parts for substitution in the formula noted in (a) above, as the carrier has done. The result of such a comparison is untrustworthy.

(c) The effect of the carrier's actual distribution of quantities is not necessarily shown by substituting its quantities in another carrier's factor development, even under a fixed rule, because neither carrier may have selected the same nor a representative set of quantities of materials and of labor in its individual computation of group factors. To illustrate this, there is shown below a comparison between this carrier's analysis and that of the Northern Pacific relative to gross material analyzed in certain groups.

Group	Great Northern	Northern Pacific
	Per cent	Per cent
Rail	76	100
Ballast	73	101
Track material	54	80
Locomotive material (approximate)	30	40
Freight-car material	66	77

It is evident from the above that although the prices are the same, the group factors would be different simply because of the difference in selection of materials.

II

[fol. 106] Before the adoption of our present method for determining the adjustment for differences in amount and use of way and structures property between the test and the guaranty periods, respectively, we found it impracticable

to compare miles of track with miles of track, station buildings with station buildings, steel bridges with steel bridges, wooden trestles with wooden trestles, roadway buildings with roadway buildings, etc., because each item and subdivision would require a different unit of measure and because the accounts of the carriers, under our rules, were not kept in a manner which made it possible to segregate maintenance charges to each of these very numerous and varied items. The only theory which seemed to afford a practicable working basis we found to be that a dollar of equal purchasing power would purchase the same amount of like facilities in the test and in the guaranty period, and that this would require an equal expenditure of such dollars for maintenance. Our adjustment for amount of way and structures property is based upon this broad assumption, with knowledge that the result may not be absolute, but with the assurance that the carrier is given the benefit of all the doubts, it being a generally accepted fact that the vast majority of additions and betterments to way and structures are undertaken because they will reduce operating costs and are justified in many instances by decreased maintenance expenses. Thus, our settlement includes an increased allowance for maintenance directly proportionate to any increase in investment, stated in dollars equated to the test period, although many of the investments are made to bring about a decrease in maintenance expense. Attempted refinements by segregation and separation of small classes of the innumerable items involved have only the appearance of greater accuracy. Unless all items could be so segregated and separated, and the effect of changes in each computed independently, the result would no more nearly approach the truth than does the broad general principle under which we work.

The carrier proposes to compute the equation factor used in reducing the investment added after the test period to a basis comparable with the investment of that period by reckoning from the time of signing the contract for the work, or the time when the work was performed, if done on a cost-plus basis, rather than from the date of audit when the investment was entered in the account. What is said above is a sufficient answer to this refinement. The carrier further proposes to state its investment in road by

adding to the recorded amount the value which it claims for that part of the facilities of other carriers used by it under joint-facility agreements, and by deducting the value which [fol. 107] it assigns to that part of its own property which is used by other carriers under similar agreements. The joint-facility rentals paid by the carrier, whether covered by a lump-sum contract or by a contract based on relative use, are divisible as between maintenance and other charges, and the maintenance portions are included in its test-period expenditures for maintenance, which are equated and of which the carrier has the benefit. To attempt an allowance for net charges in the amount of joint-facility property is an unwarranted refinement, for the reasons above stated.

In the maintenance adjustments claimed by the carrier for use of way and structures property, it would have us make separations between the effect of line-haul and yard switching. While this carrier represents that it has made a separation between its line-maintenance charges and its yard-maintenance charges, our classification of operating expenses, prior to January 1, 1920, did not require such a separation of charges, but merely made such separation permissive. An insignificant number of carriers, if any at all, attempted it. Effective January 1, 1920, such a separation was required in an endeavor to determine the separate costs of freight and passenger service. This, however, could not generally be used in the guaranty-period ascertainments because there was no such separation in the test period with which to make comparison. However, if we grant that the carrier has made a separation of such charges in the test as well as in the guaranty period, we are of the opinion that no advantage of nearer approach to accuracy is to be had by attempting separate adjustments than by the method we follow, for the reason that according to our investigation the relation between line-haul and yard switching is approximately constant. This being true, having determined the relative difference in either as between the two periods, the difference in each is ascertained. We have adopted the line haul as our measure, for the reason that the data for line haul, while not exact, permit a more definite and reliable ascertainment than the data for yard switching.

Nor are the arguments advanced by the carrier in regard to the effect of its ore traffic on the amount which should be included in this switching adjustment convincing. It may be true that the increase in ore business in the guaranty period over the test period was material, yet there is no reason why this increase should have disturbed the relation between line-haul and yard switching. No apparent difference in the length or character of line haul has been shown, and no apparent difference has been shown in the manner of handling cars in the yards in the two periods. In the formulæ adopted by the adjustment committee of the Association of Railway Executives, which the carrier has sometimes followed, attempt was made at many arbitrary [fol. 108] separations and refinements, such as the carrier now advocates, under the theory that such separations and refinements tended to greater accuracy of results. In our analysis of these formulæ it was definitely shown that such was not the case, and it was and is our opinion that, because of the arbitrary separations which had to be made in the book charges, which were not required and were not kept under our accounting rules, more inaccuracies were developed than were corrected by such attempted refinements.

III

In its special claims for additional allowances for differences in amount of equipment in the guaranty period as compared with the test period, the carrier wishes us to depart from an aggregate settlement by making separations between its different classes of cars and by applying particular equation factors to these classes. This is opposed to our procedure, and if it were not so, we could not accept the claim of the carrier, for the reason that it has modified its results by eliminating, for the purpose of its computations, locomotives and cars that were stored for short periods of time during slack business conditions, and thereby has not included in its tonnage all of the locomotives and cars that were active.

With particular reference to adjustment for differences in amount of freight-train car property, the carrier has supported its claims, first, by formulæ of its own, then by

formulæ of the adjustment committee of the Association of Railway Executives, and in various other ways. The results of some of these nearly approach its actual expenditures and that is the amount for which it finally asks. We have been unable to find any exceptional conditions on the lines of the carrier beyond its control and different from those existing on the lines of other carriers in its territory for which allowance should be made. The carrier, in its special claims, relies upon a particular and not an aggregate adjustment. It would have us separate its cars into classes and make a particular adjustment for each class based on separate equation factors for each class, to be applied to separate charges allocated to that class. It also asks a separate adjustment for amount of equipment and for its use, which we have found to be impracticable because of the manner in which accounts for freight-train car repairs are kept. Our adjustments are made for amount and use of equipment on the principle which we outlined in Final Settlement under Section 209, supra, which is that, the use remaining constant, the maintenance expenses for amount of property vary directly with and as the amount of property maintained, and that the result thus obtained must be either increased or decreased in accordance with the rela- [fol. 109] tive intensity of use of the property in the two periods. The final result is an aggregate adjustment for amount and use. The carrier, in its proposed adjustment, complies with only the first step of the above procedure, and this alone would preclude the acceptance of its proposal because of its incompleteness. Further, it would be obviously unfair, under the use of a general equation factor for all classes of property, many of which would require particular equation factors less than the general factor, to pick out a few selected classes having high particular equation factors and to adjust these according to such factors and at the same time adjust all other classes by our general equation factor, which has in it the influence of these high equation factors also.

We think it appropriate to mention here, while it has no effect on the factor, that the carrier has advanced the claim of an equity on account of per diem charges being directly credited to railway operating income, and has stated that the Government receives a direct benefit from such account-

ing. This is a confusion of the effect of our accounting rules. It makes no difference whether the per diem is taken directly into the accounts as income or whether it is separated into its various elements and so included in the accounts; under proper accounting, the net railway operating income indicated is the same.

In its claim for adjustment for differences in use of freight-train car property the carrier relies, first, upon the differences in the dispersion of cars in the test and in the guaranty periods, respectively; that is, in the different proportion of owned cars on its own lines and on the lines of other carriers in the two periods. We can not consider such a claim, for the reason that the effect of such interchange of cars is an intercarrier matter, the adjustment of which is provided for and effected through the application of the per diem and m. c. b. charges promulgated and adopted by the carriers themselves to provide for the very situation which gives rise to the claim. It is within the carriers' control and has no place in the guaranty settlement. Second, the carrier relies upon what it asserts to be the mileage of its own cars on its own lines, which differs from the mileage of foreign cars on its own lines, and upon what it alleges to be the actual mileage of its own cars on foreign lines. It may be possible that the carrier is able to determine the mileage of owned and foreign cars on its own line. We have been unable to find any method by which, or statistics from which, the alleged separate mileage for owned cars on foreign lines may be obtained. We have adopted and follow in our settlements the principle that the difference in use of freight-train cars is represented by the differences in car-miles per car in the periods under comparison. As the matter of car-miles is impossible of exact determination, we have assumed that [fol. 110] the average aggregate miles per car of all cars on the carriers' lines would represent the car-miles per car of owned cars at home, and that the average aggregate car-miles per car of the country at large would represent the car-miles made by owned cars on foreign lines. The theory of the carrier would substitute its assumption for the one which we have made and which has been generally accepted and has been used in all of our settlements. Here, again, the carrier does not follow its assumption to its logical conclusion. The result is dependent, not only upon the variable of

car-miles per car, but on the number of cars, upon the proportion of cars on and off line in each period, and upon the mileage at home and abroad in each period. Taking all these things into account as far as possible, and following the assumption of the carrier through to its conclusion, the result under this assumption will differ from the result which we have obtained and the adjustment which we have proposed by a negligible amount.

The carrier has, from time to time, made claim for special adjustment on account of the maintenance of newly constructed lines put into service immediately prior to or during the test period. We have denied similar claims in the case of a number of other carriers with which final settlement has been made. If we should disregard our previous decisions, we should still be forced to deny the claim of the carrier. Its claim approximates its purported actual expenditures for maintenance of way and structures for these lines. However, its claim rests on the performance of only slightly more than one-half of its newly constructed lines. It is not known what would have been the effect if all of its newly constructed lines had been included in its computation. Further, in order to accomplish the result desired by the carrier, it would be necessary to restate the test-period expenditures for maintenance for these lines, which, as we have before stated, we cannot do under the provisions of the law. If, as the carrier claims, its charges for this maintenance during the test period were below normal, it follows that its income was proportionately larger than it would have been had the normal maintenance been applied. As an equity in the case, although we consider the settlements with the director general and under section 209 as separate and distinct transactions, the carrier has received the benefit of a larger income on account of these new lines, not only during the guaranty period but also during the entire period of Federal control. In support of its claim in this regard, it is stated that it was in an unusual situation, having the greatest amount of newly constructed lines of any carrier in its territory. We find, however, from statements furnished by the carrier, that for the period 1909 to 1916, both years inclusive, the carrier had an increase of new lines amounting to 19.7 per cent of its [fol. 111] mileage, the Chicago, Milwaukee & St. Paul 35.7

per cent, the Northern Pacific 5.4 per cent, and the Minneapolis, St. Paul & Sault Ste. Marie 26.9 per cent, representing an average for the last three lines of 22.8 per cent, from which it does not appear that the carrier had an unusual increase in mileage in the years immediately preceding the middle of the test period as compared with other lines in its territory.

We have had the general and special claims of the carrier before us for a long time and have considered and given such weight as in our judgment seemed proper to each of the claims made by it. In consequence, in our final ascertainment we have used a factor of 2.45, five points above the territorial factor. In discussing somewhat similar contentions in Treatment of Salvage, Piecework, and Prices, supra, we said:

What we construed the law to require, and what we did, was to adopt such a general plan of procedure as in our opinion would secure the greatest measure of justice to the carriers, individually and collectively, and protection to the Government as could be secured with the force and means at our disposal.

In urging claims based upon special circumstances, it is reasonable to assume that the carriers have selected such as appear to favor them rather than those which, if specially treated, might favor the Government. One important circumstance of the latter class may be mentioned. By this contract with the railway companies, the director general was bound to return to them at the end of Federal control material and supplies similar in amount and kind to those taken over at the beginning of Federal control, or to make good to the carriers by payments of cash at prices current on March 1, 1920. The actual cost of material and supplies delivered to the carriers at the end of Federal control was, therefore, the price of the material and supplies as of December 31, 1917, or earlier. Nevertheless, the carriers, following their usual practice, charged into their expense accounts such material and supplies as were used by them at prices current in the guaranty period, thus overstating their actual operating expenses and increasing thereby the deficits to be made up under the guaranty of section 209, and also thereby increasing the apparent change in cost to them between the prices of the test period and those of the

guaranty period, respectively. This condition was referred to in our report in Treatment of Salvage, Piecework, and Prices, supra, where we stated that it was not deemed practicable to allocate the material in question and to apply cost prices thereto, although it might be assumed that the carriers had substantially profited by the omission. It is admitted by this carrier in its final brief that the charge in [fol. 112] its guaranty-period expense accounts due to this cause was about $900,000.

We find nothing in the circumstances of this carrier to justify a greater allowance based upon the contentions stated under I, II, and III. There are, however, other contentions of different nature.

IV

It is alleged that our allowance under subdivision (c), paragraph (1), of section 209, based upon increase in compensation by the director general, provided for in section 4 of the Federal control act, was insufficient, in that we included only that part of the cost of additions and betterments expended during the Federal control period and excluded expenditures incurred prior to the Federal control period for improvements which were completed and put in operation during Federal control.

Section 4 of the Federal control act provides, in substance, that the compensation of carriers under Federal control, which was measured normally by the average railway operating income during the test period, should be increased by an amount reckoned at a reasonable rate per cent, to be fixed by the President, upon the cost of additions and betterments made by the carrier with the approval of or by order of the President while the property was under Federal control. Section 209 of the transportation act refers to this provision in subdivision (c), paragraph (1), as follows:

> The United States hereby guarantees—
>
> With respect to any carrier with which a contract (exclusive of the so-called cooperative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half

the amount named in such contract as annual compensation, or, where the contract fixed a lump sum as compensation for the whole period of Federal operation, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than an amount which shall bear the same proportion to the lump sum so fixed as six months bears to the number of months during which such carrier was under Federal operation, including in both cases the increase in such compensation provided for in section 4 of the Federal Control Act.

Further reference to section 4 of the Federal control act is found in subdivision (c), paragraph (3), and subdivision (d) of section 209, from which it clearly appears that the amount to be allowed by us under section 209 in recognition of said section 4 is one-half the annual sum fixed by the President under that section. This construction we adopted in Final Settlement under Section 209, supra. The rule has been followed in this case. Under the contract between the carrier and the director general, the carrier waived interest [fol. 113] on cost of additions and betterments made by the corporation and uncompleted December 31, 1917.

V

Our report of June 17, 1925, shows an amount of $31,418.88 due the Farmers' Grain & Shipping Company and an amount of $75,698.89 due the Watertown & Sioux Falls Railway Company. These amounts were applied as offsets to the amount due from the Great Northern Railway Company, the certificates showing only the difference due from the latter company. It is claimed by the carrier that separate certificates and settlements should be made.

The report issued under date of June 17, 1925, shows clearly the finding as to the amount due to or from each of the carriers involved. These findings were combined in one certificate in conformity with the practice in dealing with groups of carriers constituting systems. The certificate recited that the two companies had individually filed with us resolutions passed by their respective boards of directors authorizing the Great Northern Railway Company to act as their agent in effecting settlement under section 209, and to receive payment of any sum or sums due them thereunder,

said companies being under common control through direct or indirect ownership of their capital stock and composing a single system of transportation.

In order that our certificate may convey to the Secretary of the Treasury all of the information needed for his guidance in concluding settlements with the carriers, it will be amended to show the amount necessary to make good the guaranty to each of the carriers involved, as well as the payments certified. Whether or not the Secretary of the Treasury should, in the light of the facts, treat the carriers individually and without reference to their common control and operation is a question for his determination.

VI

It is alleged that there were included in the railway operating income accounts of the Great Northern Railway Company for the guaranty period, as credits, items amounting to $121,932.80 which should have been credited in the accounts of the director general, and that the allowance by the carrier of this amount in its settlement with the director general would necessarily reduce the net railway operating income for the guaranty period to the same extent, thereby increasing the amount due the carrier under section 209. It is alleged that these items were erroneously charged against the carrier in our ascertainment and certificate of June 17, 1925.

The protection of the Government, as well as the necessity of avoiding discrimination in the treatment of carriers, [fol. 114] required that the determination of railway operating income be governed by the uniform accounting rules prescribed by us. Therefore, as soon as practicable after the passage of the transportation act, field examinations were undertaken to test and to correct the accounting of each carrier subject to the section, and these examinations have proceeded as rapidly as possible with the force at our disposal. Similar examinations were undertaken by the Director General of Railroads in connection with his settlement with the carriers for the period of Federal control. The items above referred to were reported as a result of the director general's examination. Our own review of the accounts, however, has shown that the amount due the Great

Northern Railway Company under section 209 in respect of such items should be increased by $98,444.48, and the certificate of June 17, 1925, will be amended accordingly. It is understood that this correction is satisfactory to the carrier.

VII

The carrier denies the authority of the commission to question the correctness of its certificate of March 1, 1921, in the amount of $6,000,000 issued under section 212 of the transportation act, which authorizes the certification of only such amounts as are definitely ascertained to be due. This contention of the carrier, in our opinion, is based upon a misconception of the purpose of the certificates provided for by sections 209 and 212. The pertinent portion of section 209 reads as follows:

The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty.

Section 212 contains the following provision:

In making certifications under section 204 or section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate * * *

It is noted that the certificates thus provided for are issued to the Secretary of the Treasury and not to the carrier to be benefited. It seems clear that their purpose is to protect the Treasury Department in its disbursement of funds of the Government and there is no indication of any intent on the part of Congress to vest the carriers with any

[fol. 115] rights under the certificates distinct from their rights under the sections as a whole. The circumstances under which the certificates covering partial payments under section 212 were issued have been described. Notwithstanding the fact that section 212 contemplated a definite ascertainment of amounts due, the statute must be read in the light of the circumstances surrounding its administration. Insistence upon absolute insurance against overpayment would have defeated the purpose of the law. If we have construed the statute too liberally, the carriers have received the benefit.

With the exception indicated, the findings of the report of June 17, 1925, are affirmed.

Amended Certificate No. A-1041 under Section 209 (g) of the Transportation Act, 1920 (Cancels Certificate No. A-1041 Dated June 17, 1925)[1]

To the Secretary of the Treasury of the United States:

1. The Interstate Commerce Commission, hereinafter called the commission, hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, the Farmers' Grain & Shipping Company, a corporation of the State of North Dakota, and the Watertown & Sioux Falls Railway Company, a corporation of the State of South Dakota, hereinafter called the carriers, are carriers as defined in subdivision (a) of section 209 of the transportation act, 1920, and that the carriers filed with the commission on or before March 15, 1920, written statements that they accepted all of the provisions of said section 209 and that the two companies last mentioned individually filed with the commission resolutions passed by their respective boards of directors authorizing the Great Northern Railway Company to act as their agent in effecting settlement under said section 209 and to receive payment of any sum or sums due them thereunder, said companies being under common control through direct or indirect ownership of their capital stock and composing a single system of transportation.

2. The commission has ascertained, and hereby certifies to the Secretary of the Treasury, that the amount necessary

[1] This certificate also embraces Finance Dockets Nos. 463 and 879.

to make good to said Great Northern Railway Company the guaranty provided by section 209 of the transportation act, 1920, is $11,170,214.02; that the amount necessary to make good said guaranty to said Farmers' Grain & Shipping Company is $31,418.88; and that the amount necessary to make good said guaranty to the said Watertown & Sioux Falls Railway Company is $75,698.89.

[fol. 116] 3. The commission has heretofore certified to the Secretary of the Treasury as advances under section 209 (h) to said Great Northern Railway Company an aggregate amount of $6,500,000, as follows:

Certificate No. 65, June 25, 1920	$3,000,000
Certificate No. 225, August 31, 1920	2,000,000
Certificate No. 276, November 4, 1920	1,500,000

and as partial payment to said Great Northern Railway Company under section 209 (g), as amended by section 212, an amount of $6,000,000 on March 1, 1921, under certificate No. A-329.

4. The commission has made final determination as aforesaid of the amount of the guaranty provided for by section 209 of the transportation act, 1920.

Dated this 8th day of June, 1926.

By the commission.

George B. McGinty, Secretary.

[fol. 117] [File endorsement omitted.]

[fol. 118] In United States District Court

In Equity. No. 864

Great Northern Railway Company, a Corporation, Petitioner,

vs.

United States of America, Defendant, and Interstate Commerce Commission, Intervener

Order Dismissing Petition—Filed October 1, 1927

This cause came on to me heard before Honorable William S. Kenyon, United States Circuit Judge, Honorable

Joseph W. Molyneaux and Honorable John B. Sanborn, United States District Judges, sitting pursuant to the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208, 219), on the 13th day of June, 1927, at St. Paul, Minnesota.

Mr. F. G. Dorety, Mr. Thomas Balmer, and Mr. Fletcher Rockwood appeared for the petitioner, and Mr. Blackburn Esterline, Assistant to the Solicitor General, and Mr. Lafayette French, Jr., United States Attorney, for the defendant, and Mr. D. W. Knowlton for the Interstate Commerce Commission, intervener.

The defendant and intervener moved to dismiss the petition on the ground that the court had no jurisdiction. The court ordered that the question of jurisdiction be first argued and determined, and, after oral argument, fixed the [fol. 119] time within which briefs should be filed on that question. Briefs have been filed by the petitioner, by the defendant, by the intervener, and by C. C. Hine, General Solicitor, Chicago, Indianapolis and Louisville Railway Company, as amicus curiæ.

The petitioner, a common carrier, brings this action against the United States of America to enjoin, set aside, annul and suspend two certificates of the Interstate Commerce Commission of the United States, dated June 17, 1925 and June 8, 1926, respectively, which purport to fix the compensation due to the petitioner under the guaranty of its earnings for the period from March 1, 1920, to September 1, 1920, under the terms of Section 209 (41 Stat. 464) and Section 212 (41 Stat. 1145) of the Transportation Act of 1920; and to restrain the defendant from acting thereunder.

The certificate of June 17, 1925, issued under Section 209 (g) of the Transportation Act, certifies to the Secretary of the Treasury that the amount of $11,178,887.31 is the amount necessary to make good to the petitioner the guaranty provided by said Section 209; that the Commission had theretofore certified to the Secretary of the Treasury, as advances under Section 209 (h), an aggregate amount of $6,500,000, and, as a partial payment under Section 209 (g) as amended by Section 212, an amount of $6,000,000, making a total of $12,500,000; that the amount due the United States on account of the overpayment to the petitioner under Section 209 (h) is $1,321,112.69.

The certificate of June 8, 1926, entitled "amended certificate" certifies that $11,170,214.02 is the amount necessary to make good to the petitioner the guaranty under Section 209; that the amount already paid to the petitioner under Section 209, and Section 209 as amended by Section 212, is $12,500,000.

The petition alleges that these certificates of the Interstate Commerce Commission are erroneous and do not fix the amount to which the petitioner is entitled under the sections of the Transportation Act referred to, and are therefore unlawful and void.

[fol. 120] The petition shows that the United States has asserted a claim against the petitioner in the amount of $1,329,785.98, with interest at 6 per cent per annum from July 8, 1926, because of the alleged overpayment. In order to avoid the offsetting of the claim of the United States against amounts due the petitioner from the government for transportation services, the petitioner, on September 20, 1926, deposited government securities pending the determination of this controversy, upon the understanding that, if it should be determined that the claim of the government is a valid claim, it might be offset against the securities so deposited, and if it should be determined to be an invalid claim, the securities should be returned.

The claim of the petitioner is, in effect, that the Interstate Commerce Commission failed to comply with the law in determining the amount due the petitioner under the Transportation Act; that the certificates constitute orders of the Commission, which may be enjoined or annulled by this court, acting under the provisions of the Urgent Deficiencies Act.

After considering the arguments and briefs of counsel, we have reached the conclusion that this court has no jurisdiction to grant the relief prayed for by the petitioner, on the grounds: (1) that the certificates are not orders which can be enjoined or annulled under the provisions of the acts giving this court jurisdiction to review orders of the Interstate Commerce Commission; (2) that Congress has not consented that the United States be sued in this court in this proceeding; (3) that in this proceeding the certificates of the Interstate Commerce Commission must be taken as final and conclusive.

It is ordered that the petition be dismissed.
Dated this 30th day of September, 1927.

Wm. S. Kenyon, United States Circuit Judge. Joseph W. Molyneaux, United States District Judge. John B. Sanborn, United States District Judge.

[File endorsement omitted.]

[fol. 121] In United States District Court

[Title omitted]

Order Dismissing Petition (Amended)—Filed October 20, 1927

This cause came on to be heard before Honorable William S. Kenyon, United States Circuit Judge, Honorable Joseph W. Molyneaux, and Honorable John B. Sanborn, United States District Judges, sitting pursuant to the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208, 219), on the 13th day of June, 1927, at St. Paul, Minnesota.

Mr. F. G. Dorety, Mr. Thomas Balmer, and Mr. Fletcher Rockwood appeared for the petitioner, and Mr. Blackburn Esterline, Assistant to the Solicitor General, and Mr. Lafayette French, Jr., United States Attorney, for the defendant, and Mr. D. W. Knowlton for the Interstate Commerce Commission, intervener.

The defendant and intervener moved to dismiss the petition on the ground that the court had no jurisdiction. The court ordered that the question of jurisdiction be first argued and determined, and, after oral argument, fixed the time within which briefs should be filed on that question. Briefs have been filed by the petitioner, by the defendant, by the intervener and by C. C. Hine, General Solicitor Chicago, Indianapolis and Louisville Railway Company, as amicus curiæ.

[fol. 122] The petitioner, a common carrier, brings this action against the United States of America to enjoin, set aside, annul and suspend two certificates of the Interstate Commerce Commission of the United States, dated June 17,

1925, and June 8, 1926, respectively, which purport to fix the compensation due to the petitioner under the guaranty of its earnings for the period from March 1, 1920, to September 1, 1920, under the terms of Section 209 (41 Stat. 464) and Section 212 (41 Stat. 1145) of the Transportation Act of 1920; and to restrain the defendant from acting thereunder.

The certificate of June 17, 1925, issued under Section 209(g) of the Transportation Act, certifies to the Secretary of the Treasury that the amount of $11,178,887.31 is the amount necessary to make good to the petitioner the guaranty provided by said Section 209; that the Commission had therefore certified to the Secretary of the Treasury, as advances under Section 209(h), an aggregate amount of $6,500,000, and, as a partial payment under Section 209(g) as amended by Section 212, an amount of $6,000,000, making a total of $12,500,000; that the amount due the United States on account of the overpayment to the petitioner under Section 209(h) is $1,321,112.69.

The certificate of June 8, 1926, entitled "amended certificate," certifies that $11,170,214.02 is the amount necessary to make good to the petitioner the guaranty under Section 209; that the amount already paid to the petitioner under Section 209, and Section 209 as amended by Section 212, is $12,500,000.

The petition alleges that these certificates of the Interstate Commerce Commission are erroneous and do not fix the amount to which the petitioner is entitled under the sections of the Transportation Act referred to, and are therefore unlawful and void.

The petition shows that the United States has asserted a claim against the petitioner in the amount of $1,329,785.98, with interest at 6 per cent per annum from July 8, 1926, because of the alleged overpayment. In order to avoid the off- [fol. 123] setting of the claim of the United States against amounts due the petitioner from the government for transportation services, the petitioner, on September 20, 1926, deposited government securities pending the determination of this controversy, upon the understanding that, if it should be determined that the claim of the government is a valid claim, it might be offset against the securities so deposited,

and if it should be determined to be an invalid claim, the securities should be returned.

The claim of the petitioner is, in effect, that the Interstate Commerce Commission failed to comply with the law in determining the amount due the petitioner under the Transportation Act; that the certificates constitute orders of the Commission, which may be enjoined or annulled by this court, acting under the provisions of the Urgent Deficiencies Act.

After considering the arguments and briefs of counsel, we have reached the conclusion that this court has no jurisdiction to grant the relief prayed for by the petitioner, on the grounds: (1) that the certificates are not orders which can be enjoined or annulled under the provisions of the acts giving this court jurisdiction to review orders of the Interstate Commerce Commission; (2) that Congress has not consented that the United States be sued in this Court in this proceeding.

It is ordered that the petition be dismissed for want of jurisdiction.

Dated this 19 day of October, 1927.

Wm. S. Kenyon, United States Circuit Judge. Joseph W. Molyneaux, United States District Judge. John B. Sanborn, United States District Judge.

[File endorsement omitted.]

[fol. 124] In United States District Court

[Title omitted]

Petition for Appeal and Order Allowing Same—Filed October 21, 1927

To the Honorable Joseph W. Molyneaux, United States District Judge:

The above named petitioner, feeling aggrieved by the order dismissing petition made and entered in the above entitled cause on the 30th day of September, 1927, as amended by the order dismissing petition (amended) made and entered in the above entitled cause on the 19th day of

October, 1297, both of which orders were made by the Honorable William S. Kenyon, United States Circuit Judge, Honorable Joseph W. Molyneaux, and Honorable John B. Sanborn, United States District Judges, sitting pursuant to the Urgent Deficiencies Act of October 22, 1913, (38 Stat. 208, 219) hereby appeals from said orders to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith; and the petitioner prays that its appeal may be allowed and that citation be issued, as provided by law, and that a transcript of the record, proceedings, and papers upon which said orders were based, duly authenticated, be sent to the Supreme [fol. 125] Court of the United States, sitting at Washington, D. C.

And your petitioner further prays that the proper order relating to the security to be required of them be made.

F. G. Dorety, Thomas Balmer, Fletcher Rockwood,
Solicitors for Petitioner.

The petition is granted and the appeal allowed, upon giving bond conditioned as required by law, in the sum of $1,000.00.

Done in open court this 21 day of October, 1927.

Joseph W. Molyneaux, District Judge.

[File endorsement omitted.]

[fols. 126-128] Bond on appeal for $1,000, approved and filed October 21, 1927, omitted in printing.

[fol. 129] In United States District Court

[Title omitted]

Assignments of Error—Filed October 21, 1927

Now on this 21st day of October, 1927, comes the petitioner, by its solicitors, F. G. Dorety, Thomas Balmer, and Fletcher Rockwood, and says that the order dismissing petition made and entered in the above entitled cause on the 30th day of September, 1927, as amended by the order dis-

missing petition (amended) made and entered in said cause on the 19th day of October, 1927, both of said orders having been made and entered by the Honorable William S. Kenyon, United States Circuit Judge, Honorable Joseph W. Molyneaux, and Honorable John B. Sanborn, United States District Judges, sitting pursuant to the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208, 219) is erroneous and unjust to said petitioner, for the reasons set forth in the following

Assignment of Errors

I

Said court erred in holding that the two certificates of the Interstate Commerce Commission, dated June 17, 1925, and June 8, 1926, respectively, which purport to fix the compensation due to the petitioner under the guaranty of its earnings for the period from March 1, 1920, to September 1, [fol. 130] 1920, under the terms of Section 209 (41 Stat. 464) and Section 212 (41 Stat. 1145) of the Transportation Act of 1920, are not orders which could be enjoined or annulled under the provisions of the acts giving said court jurisdiction to review orders of the Interstate Commerce Commission.

II

Said court erred in holding that Congress has not consented that the United States be sued in this court in this proceeding.

III

Said court erred in dismissing the petition for want of jurisdiction.

Wherefore the petitioner prays that said order dismissing petition dated September 30, 1927, as amended by said order dismissing petition (amended) dated October 19, 1927, may be reversed.

F. G. Dorety, Thomas Balmer, Fletcher Rockwood,
Solicitors for Petitioner.

Dated October 21, 1927.

[File endorsement omitted.]

[fols. 131 & 132] Citation, in usual form, showing service on Blackburn Esterline et al., filed November 1, 1927, omitted in printing.

[fol. 133] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed November 1, 1927

To the clerk of the above entitled court:

You will please include in the transcript to be transmitted to the Supreme Court of the United States upon the appeal taken by the petitioner in the above entitled cause from the order dismissing petition dated September 30, 1927, as amended by the order dismissing petition (amended) dated October 19, 1927, the following portion of the record:

(1) Petition, including exhibits.
(2) Intervention of Interstate Commerce Commission.
(3) Answer of Interstate Commerce Commission, including Exhibit "A" attached thereto.
(4) Answer of United States to the Petition.
(5) Order dismissing petition dated Sept. 30, 1927.
(6) Order dismissing Petition (Amended) dated October 19, 1927.
[fol. 134] (7) Petition for Appeal and Order allowing same.
(8) Appeal Bond.
(9) Assignment of Errors.
(10) This Præcipe.

Dated at St. Paul, Minnesota, this 21 day of October, 1927.

F. G. Dorety, Thomas Balmer, Fletcher Rockwood,
Solicitors for Petitioner.

Service of the within Præcipe is hereby accepted for the United States of America this 27 day of October, 1927.

Blackburn Esterline, Assistant to the Solicitor General. Lafayette French, Jr., United States Attorney.

Service of the within Præcipe is hereby accepted for the Interstate Commerce Commission this 27 day of October, 1927.

Daniel W. Knowlton, Solicitor for Intervener.

[File endorsement omitted.]

[fol. 135] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 136] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANT WILL RELY AND DESIGNATION TO PRINT ENTIRE RECORD—Filed November 23, 1927.

To the Clerk of the above-entitled court and to the appellees above named and their solicitors:

Please take notice that the appellant in the above entitled cause intends to rely in the above entitled court upon the following points:

1. The specially constituted court, consisting of the Honorable William S. Kenyon, United States Circuit Judge, Honorable Joseph W. Molyneaux and Honorable John B. Sanborn, United States District Judges, sitting in the United States District Court, District of Minnesota, Third Division, pursuant to the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208, 219), erred in holding that the two certificates of the Interstate Commerce Commission, dated June 17, 1925, and June 8, 1926, respectively, which purport to fix the compensation due to the petitioner under the guaranty of its earnings for the period from March 1, [fol. 137] 1920, to September 1, 1920, under the terms of

Section 209 (41 Stat. 464) and Section 212 (41 Stat. 1145) of the Transportation Act of 1920, are not orders which could be enjoined or annulled under the provisions of the acts giving said court jurisdiction to review orders of the Interstate Commerce Commission.

2. Said court erred in holding that Congress has not consented that the United States be sued in said court in this proceeding.

3. Said court erred in dismissing the petition for want of jurisdiction.

Inasmuch as the case was decided by said specially constituted court upon a motion to dismiss the petition for lack of jurisdiction, appellant thinks the entire record is necessary for the consideration of the points on which the appellant intends to rely. The record consists of the following:

(1) Petition, including exhibits.
(2) Intervention of Interstate Commerce Commission.
(3) Answer of Interstate Commerce Commission, including Exhibit "A" attached thereto.
(4) Answer of United States to the Petition.
(5) Order dismissing petition dated Sept. 30, 1927.
(6) Order dismissing petition (amended) dated October 19, 1927.
(7) Petition for Appeal and Order allowing same.
(8) Appeal Bond.
(9) Assignment of Errors.
(10) Præcipe for Appeal Transcript.

Dated at St. Paul, Minnesota, this 14th day of November, 1927.

F. G. Dorety, Thomas Balmer, Fletcher Rockwood, Solicitors for Appellant.

[fols. 138 & 139] Service of the within statement is hereby accepted for the United States of America this 23d day of November, 1927.

Blackburn Esterline, Assistant to the Solicitor General. Lafayette French, Jr., United States Attorney.

Service of the within statement is hereby accepted for the Interstate Commerce Commission this 22d day of November, 1927.

P. J. Farrell, Daniel W. Knowlton, Solicitors for Interstate Commerce Commission.

[fol. 140] [File endorsement omitted.]

Endorsed on cover: File No. 33,064. Minnesota D. C. U. S. Term No. 612. Great Northern Railway Company, appellant, vs. The United States of America and Interstate Commerce Commission. Filed November 11th, 1927. File No. 33,064.